

5-5-1982

Transcript of proceedings Volume I, pages 1-276

Wayne C. Lenhart
Court Reporter

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES,)
Plaintiff,)
v)
BOYD WALTON, JR., et ux., et)
al.; STATE OF WASHINGTON,)
Interv. Deft.,)
Defendants.)

No. 3421 ✓

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

MAY 21 1982

J. R. FALGOUT, Clerk
Deputy

combined with

UNITED STATES OF AMERICA,)
Plaintiff,)
v)
WILLIAM BOYD WALTON, et al.,)
Defendants.)

No. 3831

TRANSCRIPT OF PROCEEDINGS

VOLUME I

Spokane, May 5, 1982 - Honorable Robert J. McNichols

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FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES,)
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BOYD WALTON, JR., et ux., et)
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Interv. Deft.,)
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Defendants.)

No. 3421

combined with

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Plaintiff,)
)
v)
)
WILLIAM BOYD WALTON, et al.,)
)
Defendants.)

No. 3831

BEFORE:

The Honorable Robert J. McNichols, Judge

DATE:

May 5, 1982

APPEARANCES:

For the Plaintiff,
Colville Confederated
Tribes:

MR. WILLIAM H. VEEDER
Attorney at Law
818 - 18th Street, N.W.
Washington, D.C. 20006

For the Defendants,
Boyd Walton, Jr.,
et. al.:

MR. RICHARD B. PRICE
Attorney at Law
Box 1687
Omak, Washington 98841

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For the Defendant,
State of Washington:

MR. ROBERT E. MACK
Assistant Attorney General
Temple of Justice
Olympia, Washington 98504

For the Plaintiff,
United States of
America:

MR. ROBERT M. SWEENEY
Assistant U.S. Attorney
Box 1494
Spokane, Washington 99210

LYNN M. COX
Office of Solicitor
Department of Justice
Washington, D.C.

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Defendants.)

No. 3421

combined with

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Plaintiff,)
)
v)
)
WILLIAM BOYD WALTON, et al.,)
)
Defendants.)

No. 3831

BE IT REMEMBERED:

That the above-entitled action came regularly
on for hearing on May 5, 1982, before the Honorable Robert J.
McNichols, Judge, in the District Court of the United States
for the Eastern District of Washington, Spokane, Washington,
the appearances as heretofore shown on Page 2;

WHEREUPON, the following proceedings were had,
to wit:

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1 THE COURT: All right. For the record, this is the
2 time set for the hearing in two cases, Colville
3 Confederated Tribes versus Walton and others, Civil
4 No. 3421, and the United States of America versus
5 Walton and others, Civil No. 3831.

6 So we will have some continuity in the
7 record, gentlemen, this is the time set for a hearing
8 on the matters which require additional determination
9 by the Court ruling by the decision of the 9th Circuit
10 Court of Appeals on the previous appeal of this parti-
11 cular proceeding.

12 I don't know exactly if you have discussed
13 among yourselves the most logical manner of proceeding,
14 but you may want to be heard on that. Go ahead, Mr.
15 Sweeney.

16 MR. SWEENEY: Excuse me, Your Honor. Before I
17 get to that point, I would like to introduce to the
18 Court Lynn Cox, who is an attorney with the Department
19 of Interior at Washington, D.C., and I would ask that
20 she be allowed to participate as co-counsel.

21 THE COURT: The name is Lynn?

22 MS. COX: Lynn Cox, C-O-X.

23 THE COURT: All right. Ms. Cox, welcome to the
24 Eastern District.

25 MS. COX: Thank you.

1 MR. SWEENEY: But, would the Court want me to
2 address the point as to the order of proof?

3 THE COURT: Whatever you gentlemen think would
4 be the most appropriate. I gather that the matters
5 which are to be heard are fairly clearly understood
6 by everyone. I don't know.

7 MR. SWEENEY: Well, from the government's stand-
8 point, it appears that the issues that the 9th Circuit
9 have specifically asked to be determined upon remand
10 is whether or not there was a diligent application
11 of water to the lands now owned by Mr. Walton after
12 the lands went out of trust in the 1920's, and also
13 to determine the number of irrigable acres that are
14 owned by Mr. Walton.

15 Upon those two points, it would appear
16 that the order of proof would be logically that Mr.
17 Walton would go forward with showing, one, the dili-
18 gent application of water to a beneficial use, and the
19 irrigable acres within the 350 acres that he owns.

20 THE COURT: Yes. I have read portions of the
21 previous record. I gather that issue, the due diligence
22 issue was not really involved at that time; is that
23 correct?

24 MR. SWEENEY: It was not really addressed, Your
25 Honor.

1 THE COURT: But, there was testimony which bears
2 on that issue, I gather.

3 MR. SWEENEY: There was some, yes.

4 THE COURT: Mr. Veeder?

5 MR. VEEDER: The only observation I would make
6 rather than the order of proof, I think that the burden
7 of proof resides with the Defendant Waltons in this
8 matter. I think they not only have the obligation of
9 going ahead with the evidence at this point, but I think
10 they have the obligation of proving by a clear pre-
11 ponderance of the evidence not only lands that are
12 irrigable, but as to the due diligence.

13 I think primarily they are going to have an
14 obligation of proving the amount of water required for
15 each acre of land in this proceeding. That is a normal
16 burden under the circumstances and I think they have that
17 obligation.

18 THE COURT: All right. Well, that's a legal
19 question that I will have to determine, but for the
20 moment, Mr. Price, are you prepared to proceed on
21 the due diligence issue?

22 MR. PRICE: We are, Your Honor.

23 THE COURT: All right. Then, if you feel, gentle-
24 men, that a brief opening statement would be helpful,
25 I will be glad to hear from you. If you would prefer

1 to proceed with the testimony and the evidence at
2 this time, you may do so.

3 MR. PRICE: One housekeeping function, Your Honor.
4 If we might have the easel, with your indulgence,
5 placed over here we would anticipate that some exhibits
6 will be --

7 THE COURT: Wherever you would like to have it,
8 Mr. Cullitan will help you with it.

9 MR. PRICE: I would propose to make a brief state-
10 ment to the Court.

11 THE COURT: All right. Now, there is another
12 matter I want to -- well, I will wait until we get
13 the easel moved over here.

14 MR. VEEDER: I am not too sure of the sequence
15 that Your Honor indicated. I have pending a motion
16 here to have the Department of Justice aligned as
17 an adversary in these proceedings. I also have an
18 objection and a motion, and I think the motion has
19 been responded to, in regard to the presence of the
20 State of Washington in these proceedings, and whether
21 that should precede or be subsequent to Mr. Price's
22 opening statement, I don't know.

23 I would like to have the Department of Justice
24 aligned as they were before in the trial of the merits
25 as an adversary; they certainly are here, and I would

1 like to have an objection interposed to the State
2 of Washington being present in the courtroom apparently
3 as counsel.

4 THE COURT: Well, there is no way that I can
5 or would be inclined to tell the State of Washington
6 that they can't have someone present in the courtroom.
7 I think the Order which was previously entered ade-
8 quately addresses the position of the State.

9 I indicated, I believe, that I thought in
10 these proceedings the remaining issues which have
11 to be resolved in this somewhat protracted litigation,
12 that the 9th Circuit Court of Appeals has said in
13 effect that the State has no right to control any
14 of the waters in the No Name Creek Basin, and I so
15 indicated in the Order.

16 That does not mean, and I specifically
17 declined to rule as requested by the Tribe on the
18 contingent that the Circuit has eliminated the State
19 from any control over any water within the exterior
20 boundaries of the Colville Reservation. I don't think
21 that issue is here before me. I don't think it is
22 necessary to decide it, and I don't think it would
23 be appropriate, but as far as a legal representative
24 of the State being present during these proceedings,
25 I see no way that I should or even could exclude them.

1 MR. VEEDER: I would think it would be well for
2 them to sit in the audience then, Your Honor.

3 THE COURT: Well, Counsel, we have a bench trial
4 here. If I can't filter out this testimony and not
5 be influenced by the fact that an attorney for the
6 State is sitting at counsel table, then you have
7 got more serious problems than that to face.

8 MR. VEEDER: I think it is a serious problem,
9 Your Honor.

10 THE COURT: What is the prejudice to you?

11 MR. VEEDER: I can only assume that Mr. Mack
12 is going to participate as co-counsel for the Defendant
13 Waltons. If that is his status, I think that he should
14 be so designated and proceed in that manner.

15 THE COURT: Well, I don't think that the attorney
16 for the State has any intention of participating in
17 these proceedings, and if Counsel wants to sit where
18 he is sitting, he can stay there.

19 Now, insofar as realigning the parties in
20 this case, again, I don't think there is any necessity
21 for that. It is my obligation to determine the narrow
22 issues which are left in this case based upon the
23 evidence and as I said earlier, we don't have a jury.
24 This matter is going to be decided on the merits,
25 and I don't know what you mean by realigning the

1 parties. Would you like --

2 MR. VEEDER: May I explain what I mean?

3 THE COURT: Yes.

4 MR. VEEDER: I think they are in the position
5 here, the Department of Interior and the Department
6 of Justice, they are presently here with the objective
7 of sustaining the proposition that the Defendant Waltons
8 are entitled to participate in the water supply.
9 I think that is absolutely adversary to the interests
10 of the Tribe.

11 Now, throughout the entire trial on the
12 merits, the Department of Justice has vigorously
13 opposed us. In the 9th Circuit they vigorously
14 opposed us. They dropped their appeal there which
15 is very wise, but they did proceed aggressively against
16 us in an effort to defeat the claims of the Colville
17 Confederated Tribes. Now, that is what I mean by
18 an adversary.

19 Now, I don't care if they are aligned as
20 a defendant. They should be; they should be because
21 they are aggressively against us, and you will see
22 that the briefs that they filed are aggressively
23 against us, and I think it is totally unfair for us
24 to be submitted to that kind of double representation
25 against us.

1 THE COURT: What are you asking me to do?

2 MR. VEEDER: I am asking you to declare that
3 we can cross-examine any of their witnesses; that
4 every objection we interpose to them will be treated
5 as if they are an adversary so that we will have a
6 good and clear record when it goes on appeal; that
7 the Department of Justice's Trustee for the Colville
8 Confederated Tribes has proceeded aggressively to
9 defeat the claims fo the Colville Confederated Tribes.
10 It is unique. There are no parties, I realize that.

11 THE COURT: Mr. Sweeney, do you want to respond
12 to that?

13 MR. SWEENEY: Yes, I do, Your Honor. The
14 United States of America is properly before the Court
15 in this case as the Plaintiff in Civil No. 3831. The
16 United States is the owner of the lands held in trust
17 on the Colville Indian Reservation, and thus, it has
18 a responsibility to protect the rights that are
19 accruing to the Tribe and to the allottees on those
20 trust lands.

21 Now, it is not the Department of Justice or
22 the Department of the Interior; it is the United States
23 of America that is a party here.

24 It so happens that on certain points the
25 position of the United States and the position of the

1 Colville Tribe, as articulated by Mr. Veeder, do not
2 coincide, but it is our responsibility as counsel for
3 the United States to present the position of the
4 United States to the Court even though it may divert
5 from Mr. Veeder's perception of what it should be,
6 and that is what we are doing.

7 We have no objection to Mr. Veeder cross-
8 examining the witnesses proposed by the United States,
9 or having a designation made at the time he makes an
10 objection as to any particular matters that may come
11 forth, but as far as having realignment of parties,
12 it has no meaning. Mr. Veeder made the same motion
13 in the 9th Circuit and it was not granted.

14 MR. VEEDER: They withdrew, and that's why it
15 wasn't granted.

16 THE COURT: Mr. Veeder, I'm going to lay down
17 some rules right off the bat here, and I'm going to
18 enforce them. We are going to have one counsel talking
19 at a time. Counsel will address their remarks to the
20 Court if there are any objections or criticism of any
21 counsel.

22 Now, we are going to proceed in that orderly
23 way, and I will assure you of that. All right.

24 MR. SWEENEY: I don't have anything more, Your
25 Honor. I don't believe there is any substance to

1 Mr. Veeder's motion at all.

2 THE COURT: Well, I will determine the questions
3 of examining and cross-examining of the witnesses as
4 they appear, and I am going to be fairly liberal in
5 that area because I want the facts brought out here as
6 thoroughly as possible. I have every intention hope-
7 fully of putting this litigation or bringing this
8 litigation to a conclusion as such as soon as we com-
9 plete the testimony.

10 MR. VEEDER: I would like to make it clear that
11 the only reason, and it is specific in the Opinion
12 of the 9th Circuit which said when the Department of
13 Justice dropped its appeal, our motion not to be
14 bound by their conduct was denied. Now, that came
15 about because the Department of Justice didn't want
16 to contest the matter.

17 Your Honor is certainly free, and I guess
18 you have ruled against our motion to align these people
19 as adversaries, and that's all I wanted to have was
20 the record clear on that matter.

21 THE COURT: Well, as I said, Mr. Veeder, in
22 this proceeding how they may formally be aligned or
23 not, I am going to be required to make findings of
24 fact here and I don't think, and I don't know what you
25 are referring to at the moment factually, and that may

1 not be important at the moment, but if the position
2 of the government is not on all fours with the Tribe,
3 I don't think that necessarily makes the government
4 an adversary to the Tribe. They may disagree with
5 them, but as Mr. Sweeney has indicated, he has no
6 objection to your cross-examining the government
7 witnesses, and I think we are -- I just don't think
8 this formal alignment business is all that important.

9 MR. VEEDER: Just so the record is clear, you
10 denied the motion?

11 THE COURT: Okay. I don't know exactly what
12 the motion is, but whatever it is, it is denied.

13 MR. VEEDER: The motion is when we proceed in
14 this matter that I want it very, very clear that in
15 regard to the briefs that they filed, I am going to
16 respond to them as an adversary because they are
17 totally against us in this matter. When they call a
18 witness, we are going to cross-examine them.

19 THE COURT: We will cross those bridges as we
20 come to them, and I understand your position. I
21 think it is clear on the record.

22 MR. VEEDER: Thank you.

23 THE COURT: Mr. Price?

24 MR. PRICE: Thank you, Your Honor. Mr. Sweeney,
25 Mr. Veeder, Mr. Mack, Your Honor, the 9th Circuit

1 in its remand order, used some interesting language
2 in terms of asking this Court to make some factual
3 determinations regarding the amount of irrigable acres
4 on the Walton property, and the amount of water that
5 he appropriated with reasonable diligence in order to
6 determine the extent of his, the Waltons' right.

7 We are going to take the position and ask
8 this Court to adopt the position, whether it does now
9 or at the conclusion of the evidence and review of
10 briefing, that the relevant testimony that this Court
11 is to consider is as directed by the 9th Circuit and
12 should be limited to the testimony of the Waltons'
13 use of the property, the amount of irrigable acres
14 on the Walton property as they farm it, and determine
15 the extent of their rights thereby.

16 We intend to elicit testimony from witnesses
17 going back to the time that this land came out of
18 trust because we cannot anticipate the Court's ruling
19 on that matter at this time, and we do not want to
20 foreclose ourselves on appeal, but by putting that
21 testimony on, we do not want to necessarily intimate
22 that we believe that it is necessary to the Court's
23 determination.

24 THE COURT: Are you saying, Mr. Price, that the
25 language which the Circuit used, and I might as well

1 put it in the record right now, but I gather that is
2 what you are referring to.

3 It says, "On Remand, it," the Trial Court,
4 "will need to determine the number of irrigable acres
5 the Waltons own." Now, I don't see any problem there.
6 That is an evidentiary matter. "And the amount of
7 water he appropriated with reasonable diligence in
8 order to determine the extent of his right to share
9 and reserve water."

10 You are saying or you are taking the position
11 that the utilization of the water by Mr. Walton's
12 predecessors and their efforts and their conduct in
13 diverting water into irrigable lands is not relevant,
14 but that the only issue is what the Waltons have done
15 since they have been there.

16 MR. PRICE: That's correct.

17 THE COURT: Well, I would think you would be
18 wise to put on whatever testimony you have as to
19 prior users also. That may be a rather narrow inter-
20 pretation of what the Circuit said.

21 MR. PRICE: I understand that, Your Honor.

22 THE COURT: I am not ruling on it, but I want
23 you to know what I think about it.

24 MR. PRICE: The reason I call this matter to Your
25 Honor's attention is that as time goes by, and we are

1 going to face this problem in this case, testimony
2 will not be available and this is going to be an
3 important issue down through the years as people die
4 and testimony will be lost, evidence as to irrigation
5 practices will be lost until another quarter century
6 or half century. We will not have testimony to try
7 and do what we are going to accomplish in this case.

8 I want to point out to Your Honor that in
9 one of the cases we cite to the brief, in our brief
10 is the Longmire case. One of the factors that the
11 Court found relevant and important in terms of the
12 intention and diligence of a party in putting water
13 to appropriative use was the acquisition of their
14 property itself which defined boundaries, and that
15 by so purchasing the property the Court could reason-
16 ably infer that the purchasers intended to ultimately
17 put the water to use within the limits of the irrigable
18 acres contained within those defined boundaries, and
19 we are going to ask Your Honor to consider that as an
20 important factor in this case.

21 With respect to the factual testimony about
22 the land from the time it came out of trust status to
23 the present time, we expect there to be testimony about
24 immediate use of water upon the land when it came out
25 of trust. In fact, I think the testimony will sub-

1 stantiate, Your Honor, that Mrs. Wham was leasing the
2 first tract of land that she purchased and was putting
3 water to beneficial use as it was in trust status, so
4 that water was being beneficially applied at the very
5 minute it came out of trustee status.

6 The historical documents are in evidence
7 and we will submit a few more, but these documents
8 are already in evidence in terms of the historical
9 documents relating to the trust allotments themselves
10 which indicate that she was the bidder on one of the
11 tracts, the only bidder, and that she had been irri-
12 gating on the land prior to the bid.

13 We are going to ask Your Honor to consider
14 the factors of practicality. Arizona v. California
15 talked about defining the reserved right in terms of
16 practicable irrigable acres. We think the term
17 practicable is significant in terms of what you have
18 to decide in this limited hearing.

19 Practicable has relevance to dominant
20 societies' rules and regulations; the non-Indian, the
21 United States government, and the citizens under that
22 until Indians were determined to be citizens;
23 practicable in the sense of economy; practicable in the
24 sense of manpower; practicable in the sense of tech-
25 nology, the state of the art at a given point in time.

1 All of these factors, we contend, are going
2 to have to be considered, and the testimony will sub-
3 stantiate that in the early '20's, the middle '20's,
4 and the late '20's, when these three tracts respectively
5 came out of trust status, there were different condi-
6 tions than those that exist today.

7 We would ask Your Honor to consider the
8 testimony in light of the factors that were available
9 in the '20's, '30's, and '40's, versus what factors
10 were available in the '50's.

11 Quite frankly, we are going to ask Your
12 Honor to consider these factors in light of the cases
13 we have cited in our brief to the extent that a water
14 right may be expanded. I think the 9th Circuit has
15 obviously indicated that to us, but the factors that
16 go into this expansion have to be related to the
17 individual setting.

18 The Waltons cannot be related to a case in
19 Eastern Idaho, Western Montana, or anywhere else
20 in the western United States. The particular topo-
21 graphy, geography of the land in question will dic-
22 tate what, if any, irrigation can be employed at any
23 given time. The factors of the Whams, of the Momaws,
24 who were residents on this property, would dictate
25 the limit of irrigation that can be employed at any

1 given time.

2 It is not an easy factor. It is not a
3 matter that can be taken out of the air and said,
4 as we expect the United States government to do,
5 that within five years of coming out of trust, you
6 have to have put all of the water that can be put
7 to irrigation to use. Five years after 1921, is
8 1926, and we contend that the evidence is going to
9 substantiate that neither the economy, the state of
10 the art, technology in terms of irrigation practices,
11 or the topography of this land would allow for the
12 160 acres that is now under irrigation today to be
13 employed under irrigation.

14 The evidence will show that just from a
15 mere physical factor one man couldn't carry the steel
16 pipes that were used for irrigation if irrigation
17 was to be applied. One man could not move a five
18 horsepower pump up and down the creek changing from
19 field to field and still tend to the cows, the dairy,
20 and whatever else had to be done. One man could not
21 generate sufficient income off of 350 acres to employ
22 labor to come in and assist him to run rill irrigation
23 or to move steel pipe if it was even movable at all.
24 We contend that the evidence will show that without
25 power, irrigation on the Waltons' property was a

1 Herculean effort for the minimal acreage that was put
2 to use at that time.

3 We are going to ask Your Honor to go back
4 through some of the exhibits again, the historical
5 documents, the appraisals that were utilized by the
6 government in putting this land up for bid to private
7 sale for fee status ownership, and advertisements
8 that were utilized to the public on Allotment 525,
9 Walton's northern tract, which in the advertisement
10 of January 26, 1925, provided about five acres --
11 indicated 500 -- excuse me, 100 acres was being sold
12 for an appraised value of \$1950, and I quote, "about
13 five acres of this land might be irrigated from the
14 creek, and 15 acres additional can be farmed, balance
15 suitable for grazing."

16 We are going to ask that the United States
17 government as the legal owner of this land be bound
18 by what it found to be the practicable irrigable
19 acres at the time it came out of trust, and as you
20 go through each of these allotments, 525, 894, and
21 2731, you are going to find that the only irrigable
22 acreage that the government either appraised or adver-
23 tized was a total of five acres, and the testimony we
24 are going to have, including the daughter of Hettie
25 Justice Wham, who will be here this morning or this

1 afternoon assuming she is capable, will testify about
2 the family's efforts trying to irrigate that amount
3 of acreage and actually accomplishing something more
4 than that.

5 We think the evidence will show that until
6 the 1940's, late 1940's, nothing changed in terms of
7 the state of the art of technology; nothing changed as
8 far as the topography of the land that would require
9 this Court to consider any more irrigation than what
10 the government indicated to be irrigated in 1925.

11 The evidence is going to show that in 1947,
12 and 1948, a real revolution took place in this country.
13 The Second World War had ended. The country had turned
14 its attention from a war effort to a civilian effort
15 to get the economy back on its feet, and it did.

16 The advent of aluminum pipe, we will have
17 testimony, probably turned Okanogan County around and
18 a good share of the western United States in terms of
19 what was before not practicable irrigable acreage
20 became practicably irrigable. The advent of power,
21 REA, President Roosevelt, the Democrats, a dream come
22 true from Grand Coulee Dam; the power coming into the
23 valley for the first time made things available;
24 electricity, lights in the house, lights in the barn
25 and pumps to pump the water made available through

1 aluminum irrigation pipes.

2 Testimony is going to show that this
3 significantly transformed this valley in terms of what
4 was irrigable. From that point, the Waltons acquired
5 the property, and we will show through the testimony
6 that a diligent effort was made, and within five years
7 even taking the government's arbitrary rule of five
8 years, assuming that's what they come up with, we will
9 establish that the Waltons had the 160 acres available
10 and under irrigation at any given time within that
11 five-year period by 1953, as a matter of fact, and that
12 those efforts again were not only diligent, admirable,
13 but Herculean, and I want to ask this Court to remember
14 as we put this testimony on that the history of the
15 Dawes Act, we have put evidentiary materials in
16 evidence here concerning the evidence of the Dawes Act
17 which made the purchase of property within the
18 reservation by non-Indians possible.

19 We are going to ask that you remember that
20 Senator Dawes' dream was that the White Man, as he
21 was referred to then, would come in and live by land
22 and live side by side with the Indian so as to trans-
23 form the Indian from the nomadic habits and acquire
24 agrarian methods. This was a dictate of Congress.

25 What we are going to show is evidence that

1 it happened; the Whams came in in a limited, narrow
2 valley. This wasn't a wide expanse where huge
3 irrigation districts could go in or anything like
4 that. The evidence will show that no more than four
5 families lived here at any given time in addition to
6 the Waltons. It was far from any town site. Even
7 when the Waltons got there in the late '40's, it was
8 an hour's drive to get into the town of Omak.

9 The purpose was to try and assist the Indian.
10 The Whams came in. There will be testimony that they
11 did exactly that, and that there would be Indians
12 come and stand, just walk into the Whams' house and
13 stand there, and the Whams wouldn't know who they were
14 or why they were there. There was a real concern for
15 their safety and such. Nothing ever really happened,
16 but it was a joining of two societies, the dominant
17 society trying to dictate and change the life style
18 of the nondominant society, and that from the '20's,
19 '30's, and '40's, it was happening, and in the '50's,
20 the Waltons brought the power in not only that benefited
21 them, but it benefited the Indian allottees around
22 them.

23 This Court is now being asked to determine
24 whether or not the purpose for which the Dawes Act was
25 passed can be taken away from those few select people

1 who took the risk and the challenge to reside among
2 the Indian Nations at that time when it was not an
3 altogether known or safe risk; that they put their
4 agrarian skills to the use to the best of their
5 ability within the state of the art, and that now
6 whether or not they are going to be asked that they
7 have to give up that water right that gives them the
8 ability to share their methods with the Indian be
9 taken away.

10 With this background and in this light, we
11 ask Your Honor to consider these individual points
12 with respect to the individual Walton property and
13 not be swayed or guided by other cases that do not
14 relate to the factual situations that we expect to
15 present here today. Thank you.

16 THE COURT: All right. Mr. Price, thank you.

17 MR. PRICE: I call Mr. Walton to the stand.

18
19 WILLIAM BOYD WALTON, the defendant herein, called
20 as a witness on his own behalf,
21 having been first duly sworn,
22 was examined and testified as
23 follows:
24
25

1 THE CLERK: Would you please state your full
2 name for the Court and spell your last?

3 THE WITNESS: William Boyd Walton.
4

5 DIRECT EXAMINATION

6 BY MR. PRICE:

7 Q Mr. Walton, where do you reside? Where do you reside?

8 A In Omak.

9 Q Actually not in Omak; you reside outside of Omak?

10 A That's correct, on the piece of property which is now
11 known as the Walton Ranch.

12 Q And that is on the No Name Creek Valley?

13 A That's correct.

14 Q Within the No Name Creek aquifer?

15 A That's correct.

16 Q What is the extent of your formal education, Mr.
17 Walton?

18 A I attended Omak --

19 MR. VEEDER: We will concede that he went through
20 the Washington State University, and that he is a
21 farmer, and that he has been a farmer for some time.
22 I concede that.

23 THE COURT: Well, I didn't hear this earlier
24 case. As I said, I am going to allow a certain amount
25 of leeway in developing the testimony. I assume it

1 won't be lengthy. Go ahead, Mr. Price.

2 THE WITNESS: I went to St. Mary's Mission for
3 six years, graduated from Omak High School and also
4 Washington State University.

5 Q. (By Mr. Price) What was your degree from Washington
6 State?

7 A. Agriculture.

8 Q. And when did you graduate from Washington State?

9 A. 1964.

10 Q. All right. Your father purchased the property upon
11 which you now reside; is that correct?

12 A. That's correct.

13 Q. That consists of 350 acres approximately?

14 A. It did at the time he purchased it. Since then, we
15 have sold 12 acres to Judge Dave Edwards.

16 Q. 350 acres, less 12 acres, and when was -- that property
17 consists of three former Indian allotments; is that
18 not correct?

19 A. That's correct.

20 Q. And when did your father acquire that property,
21 Mr. Walton?

22 A. We moved on in July of 1948. I don't know when the
23 deed was signed over, but it was within a month of
24 that time.

25 Q. All right. How old were you?

1 A. Six years old.

2 Q. Do you have a recollection of moving onto that

3 property?

4 A. Yes, I do.

5 Q. Mr. Walton, describe your family at the time you moved

6 on that property. How many of there were you?

7 A. My dad, my mother, myself, and two brothers.

8 Q. All right. Were your brothers older?

9 A. Younger.

10 Q. Younger. When you moved on the property do you have

11 a recollection and a knowledge of what lands had

12 been irrigated? Do you have a recollection and a

13 knowledge of which lands were being irrigated at the

14 time you moved onto the property?

15 MR. VEEDER: I object to the question. This man

16 said he was six years old, and he says he does have a

17 recollection of the land that was irrigated, and I am

18 going to interpose an objection to this.

19 I don't believe the man can remember those

20 things. I think we are wasting a lot of time on this

21 build up because so far as we are concerned, this is

22 all in the record, Your Honor. We concede all these

23 things, but what we are saying is that Mr. Walton at

24 six wasn't going to remember any acreage, and I think

25 that we ought to have that clear now.

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THE COURT: Is that your objection?

MR. VEEDER: Yes, it is.

THE COURT: Well, he was asked if he can remember.
I am going to permit him to say whether he can or not.

I will overrule the objection.

THE WITNESS: Yes, I do remember because it was
my job to irrigate part of it.

Q. (By Mr. Price) All right. Do you have an exhibit
there in front of you that depicts essentially the 350
acres that your father purchased in '48?

A. Yes, I do.

Q. And would you identify that for me by the number,
please?

MR. VEEDER: May I go and look at the exhibit?

THE COURT: Yes. Go ahead.

THE WITNESS: SSSS, that's four S's, and RRRR.

Q. (By Mr. Price) Just that one, please. Just the one
for 1949, please.

THE COURT: That is Exhibit RRRR?

THE WITNESS: Four S's, SSSS.

THE COURT: All right.

Q. (By Mr. Price) Does that exhibit outline and depict
an overview of your property?

A. Yes, it does.

Q. With the creek as it runs through it?

1 A. Yes, it does.

2 Q. And have you identified on that exhibit the acreages
3 that were under irrigation at the time your father
4 and your family moved to the property?

5 A. Yes, I have.

6 MR. PRICE: All right. I would offer Exhibit
7 SSSS.

8 THE COURT: How did we get to a quadruple S?
9 Is that in a previous action?

10 MR. PRICE: We were up to triple S's or whatever.

11 THE CLERK: The numbering system that was started
12 way back when was that type of numbering system, and
13 it has just been continued.

14 THE COURT: Is this a new exhibit from the previous
15 proceeding?

16 MR. PRICE: Yes.

17 THE COURT: Is there any objection to this
18 exhibit?

19 MR. VEEDER: I would like to see it.

20 MR. SWEENEY: Yes, I would like to see it.

21 THE COURT: Yes. You have an opportunity to look
22 at it.

23 THE WITNESS: This picture shows the amount of
24 acreage that was --

25 MR. VEEDER: Well, before he goes further, may I

1 see the exhibit, please?

2 THE WITNESS: -- that was irrigated in --

3 MR. PRICE: Boyd, excuse me.

4 THE COURT: Well, I wanted that answer, though.
5 The question to him was whether this exhibit, SSSS,
6 indicated the land that was being irrigated in 1948.
7 Is that correct?

8 THE WITNESS: I would like to answer that ques-
9 tion.

10 THE COURT: All right.

11 THE WITNESS: It indicates the land that was
12 irrigated in 1948; however, the chart shows it in 1949.
13 It was irrigated in both years.

14 THE COURT: All right. Then, Counsel can go
15 ahead and look at the exhibit.

16 Is the dark blue portion on there, does
17 that represent the land that was being irrigated at
18 that time?

19 THE WITNESS: That's correct, Your Honor.

20 MR. VEEDER: May I ask some questions on voir
21 dire, please?

22 THE COURT: Yes.

23 MR. VEEDER: Would you state the source of
24 water -- before we go any further, there is no way
25 you can identify where these things are because allot-

1 ment records are not on it, and I want the record to
2 show that, and we object to this exhibit on the basis
3 that Mr. Walton is purporting to remember what
4 happened in 1949, when he was six years old, so I
5 want that clear. That objection has been overruled
6 as I understand it.

7 THE COURT: Yes.

8 MR. VEEDER: Now, Mr. Walton --

9 THE COURT: That would go to the weight of his
10 testimony, if anything, but go ahead.

11
12 VOIR DIRE EXAMINATION

13 BY MR. VEEDER:

14 Q Mr. Walton, as you stated in the record, the source
15 of the water -- I am going to have to ask him to mark
16 this exhibit.

17 THE COURT: Is there any reason why we can't
18 indicate which allotment those various areas are in?

19 MR. PRICE: Certainly not, Your Honor; however,
20 I don't hear any question posed yet that would be
21 proper voir dire. If he wants to cross-examine him --

22 MR. VEEDER: No, no. I am asking the man how
23 he would know how much land was irrigated in what
24 appears to be a portion of Allotment 894, lying east
25 of the road. How was that land irrigated?

1 Now, would you come here and mark this
2 because there are two spots here. One appears to
3 have been irrigated from No Name Creek. If I under-
4 stand what you have done --

5 MR. PRICE: Your Honor, I am still going to ask --
6 this is cross-examination. There is nothing that is
7 challenging to the exhibit. It is a demonstrative
8 exhibit as to the areas that this witness remembers
9 as being irrigated when they came to the property.

10 THE COURT: All right. Well, let's get the --
11 I think it is appropriate to indicate, if Mr. Walton
12 can do so, what allotments that land is in, if he
13 can.

14 MR. VEEDER: That is one of the things I want
15 to know, and I want to know the sources of water as
16 for this irrigation.

17 Q. (By Mr. Veeder) Now, what are you doing, Mr. Walton?
18 A. Trying to find the allotment numbers.

19 Q. Well, I can give you the allotment numbers. That is
20 894.

21 A. This is 894?

22 Q. Yes. That is 894. Now, it becomes important for you
23 to tell us on voir dire how you knew the sources of
24 water for the land in Allotment 894 east of the road.
25 That will help him. Tell us where the water came from

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at that time.

2

A. For Field No. 2, as I have marked, the source of the water was the spring.

3

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Q. Now, where is the spring?

5

A. On and adjacent and above 894.

6

Q. It was off 894?

7

A. No, I did not say that.

8

Q. Now, mark the source of the water, would you, please?

9

A. There are two lines there.

10

Q. Now, would you --

11

A. The main line shows the creek flow as I have known it.

12

The dotted line is the intermittent line which represents intermittent flow from year to year.

13

14

Q. And at the age of six, can you tell us the basis upon determining the acreage that was what you call Parcel 2 there?

15

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A. I did not determine the acreage at the age of six.

18

I visually remember the field size, I marked the field size on an overlay and had it -- a pilimeter at a later date. I am not sure if that's the correct word, but it was measured by the Soil Conservation Service from Mr. Bill Bennett.

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Q. And this is based upon your recollection at six?

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A. That's correct.

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Q. Do you remember how much water was in the stream at

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this --

A. It was knee deep.

Q. To you? Where -- in the middle of the field?

A. To me.

MR. PRICE: Your Honor, we are beyond voir dire.

THE COURT: We are getting a little beyond it. I understand this exhibit is offered only to demonstrate Mr. Walton's testimony, and I think some exhibits like that are going to be helpful to me in figuring this out.

Is there an objection to the exhibit?

MR. VEEDER: Yes, there is no foundation for this exhibit whatsoever. There is no foundation for any allocation for him to depict any --

THE COURT: Well, the only testimony was that those were the areas which he recalls were being irrigated at the time he was six years old.

MR. VEEDER: In 1949.

THE COURT: That's the only purpose of the exhibit. Mr. Sweeney?

MR. SWEENEY: We have no objection, Your Honor.

MR. VEEDER: There is no foundation for it whatsoever. We object.

THE COURT: Exhibit SSSS will be admitted. There are four S's in this exhibit. That's going to

1 present a problem in this case.

2

3 DIRECT EXAMINATION (Continuing):

4 Q. (By Mr. Price) Mr. Walton, the upper portion of the
5 exhibit where you have Field 1 would be in what
6 was former Allotment S-525. Is that not correct?

7 A. If that is the correct number, that is correct.

8 Q. And the lower portion that has no blue marking on it
9 at all is Allotment --

10 MR. VEEDER: I object to this. This is leading.
11 These are totally leading questions by Counsel.
12 The witness should know where his allotments are.

13 THE COURT: Is there any question where the
14 allotments are, Mr. Veeder?

15 MR. VEEDER: Yes, very serious questions as
16 to what lands were irrigated and when.

17 THE COURT: No. The question was what portions
18 of the lands are located within which allotment.
19 Are you even not in agreement on that?

20 THE WITNESS: Mr. Veeder --

21 MR. VEEDER: No, no. You are not to talk to me
22 yet.

23 THE COURT: All right. Sit down, Mr. Veeder.

24 MR. VEEDER: I want to know what allotments they
25 are putting this on because it is extremely important

1 to our defense.

2 MR. PRICE: You just asked that, Mr. Veeder, and
3 I was attempting to answer that when you objected.

4 MR. VEEDER: My point is that I don't want
5 Counsel to testify.

6 THE COURT: You sit down and, Mr. Price, please
7 develop which land was within which allotment.

8 MR. PRICE: Thank you.

9 Q (By Mr. Price) In Field No. 2, as depicted, is in
10 Allotment S-894. Is that correct?

11 A. I am not familiar with any allotment system.

12 Q All right. Fine. You say you were assisting your
13 father with the irrigation after you came onto the
14 property?

15 A. That's correct.

16 Q Was there any electricity on the property when you
17 came there?

18 A. No, there was not.

19 Q Was there any electricity below you?

20 A. No.

21 Q Where was the nearest electricity?

22 A. The nearest electricity at that time was at St. Mary's
23 Mission, and that was PUD.

24 Q That was not REA power?

25 A. No, that was not REA.

1 Q Did your father undertake to farm the property after
2 he moved there?
3 A Yes.
4 MR. VEEDER: I am objecting to this. This is
5 again a leading question. We went through this
6 before. It is leading. I don't see why he doesn't
7 formulate a proper question. This is a leading
8 question and I object to it.
9 THE COURT: The question was whether his father
10 commenced farming on the property. That is not a
11 leading question, and the objection is overruled.
12 Q (By Mr. Price) What kind of farming did your father
13 undertake, Mr. Walton? In other words, was this a
14 beef cattle ranch, a dairy ranch, a hay ranch, or
15 what, if anything?
16 A It was a dairy operation assisted by putting up our
17 own hay and grain.
18 Q All right. Did that or did that not require irriga-
19 tion of certain acreages on your property?
20 A We irrigated certain acreages to get hay.
21 Q All right. Have you drawn on demonstrative exhibit
22 those areas that you put to irrigation after first
23 coming onto the property?
24 A Yes, I have.
25 Q Would you show that to the Court, please?

1 A. As I remember Field 1, this field is located south
2 of the house. It was irrigated from a ditch from
3 what is now called No Name Creek.

4 Field No. 2 is located to the east of the
5 road and was irrigated from a spring to the east of the
6 field.

7 Q. All right. How many -- do you have a recollection
8 of the size of the dairy herd at that time?

9 A. Yes, I do.

10 Q. And what was that?

11 A. We were milking 27 cows in 1949.

12 Q. Was there any electricity generated in any form
13 during the period that the cows were milked?

14 A. Yes, sir, there was.

15 Q. How was that accomplished?

16 A. We had a Model A Ford hooked up to a one K generator.

17 Q. You would run the generator off of a car?

18 A. That's correct.

19 Q. That would get power to the milking shed?

20 A. To the milking barn and the house.

21 Q. You would also have lights during periods that the
22 cows were being milked?

23 A. That's correct.

24 Q. Do you have an exhibit that depicts demonstratively
25 the irrigation practices your father and you employed

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in 1950?

A. Yes, I do.

Q. Would you show that to the Court, please? Before you get to that, at the time you came onto the property was there an existing dairy herd on the property?

A. No, there was not.

Q. All right. Would you describe to the Court the exhibit that you have turned over and identify it by number, please?

A. Defendant's Exhibit RRRR, represents the amount of land that was sprinkler irrigated and flood irrigated in 1950.

Q. The green depicts what?

A. Irrigation from an electric pump and aluminum irrigation pipe.

Q. And the blue depicts what?

A. Flood irrigation.

Q. And you have indicated the total amount of acres under irrigation by either method as of 1950, on that exhibit; is that correct?

A. That's correct.

MR. PRICE: All right. I would offer the exhibit.

THE COURT: Mr. Veeder or Mr. Sweeney?

MR. VEEDER: How did you determine, Mr. Walton,

1 the number of acres that were irrigated?

2 THE WITNESS: As I recognized the fields, I
3 drew them on an overlay and had Mr. Bill Bennet measure
4 them.

5 MR. VEEDER: Now, in regard to sources of water
6 in 19- -- what was it -- what's the date on it? 1950?

7 THE COURT: Mr. Veeder, could you turn so that
8 the Reporter can hear you? I think she might miss
9 something.

10 MR. VEEDER: Those acreages that you are depicting
11 there do not evidence the areas that were then and are
12 presently waterlogged, do they?

13 THE WITNESS: I do not know what you mean by
14 waterlogged.

15 MR. VEEDER: Where the water table is so high
16 that you have phreatophytic growth where actually it
17 is not irrigated, and the ground water just got the
18 whole place so wet that it is boggy, I believe is your
19 father's term. It is boggy.

20 Isn't this land -- for the record we are
21 pointing to an area in the southern part of Allotment
22 2371 extending down to what we will call the granitic
23 lip, that area that you have got in purple. Isn't
24 there extremely high water table there?

25 THE WITNESS: No, there is not.

1 MR. VEEDER: That's all the questions I have.
2 THE COURT: All right. Mr. Sweeney?
3 MR. SWEENEY: We have no objection.
4 THE COURT: Is there any objection to Exhibit
5 RRRR?
6 MR. VEEDER: We will object. There is no founda-
7 tion for this. There is no basis whatsoever for deter-
8 mining acreage. There is no basis for showing irriga-
9 tion on this.
10 THE COURT: All right. The exhibit will be
11 admitted as demonstrative of Mr. Walton's testimony.
12 I understand, Mr. Walton, that in indicating
13 the amount of land that was under irrigation, you are
14 really calling upon your recollection?
15 THE WITNESS: That's correct, Your Honor.
16 THE COURT: All right. The exhibit will be
17 admitted.
18 Q. (By Mr. Price) When you say you are calling upon
19 your recollection, you have then had those fields,
20 according to your recollection, measured by Mr.
21 Bennet? Is that what you said?
22 A. That's correct.
23 Q. And who is Mr. Bennet?
24 A. He was in the Soil Conservation Service in Okanogan
25 working for the U.S. Federal government.

1 Q And he testified in the trial of this matter pre-
2 viously, did he not?

3 A That's correct.

4 Q Calling your attention to Exhibit T-W, which is on
5 the easel, an exhibit previously admitted in this
6 case, can you tell us for the Court the identifica-
7 tion of the various items on there and what they
8 represent?

9 Mr. Walton, it might help if you would
10 stand to the other side.

11 THE COURT: There is a pointer there. Could you
12 get that for him?

13 THE WITNESS: The red X's indicate the locations
14 of different electric irrigation pumps.

15 Q (By Mr. Price) First of all, Mr. Walton, Exhibit T-W
16 again depicts basically the same thing that is on
17 Exhibit RRRR, the former three Indian allotments and
18 the creek as it runs through your property?

19 A That's correct.

20 Q And your property being before -- the previously
21 three Indian allotments that we have identified?

22 A That's correct.

23 MR. VEEDER: May I inquire once more?

24 This is not from your own personal knowledge;
25 is this in regard to the diversion use of water? Is

1 this your recollection, your personal recollection
2 on this?

3 THE WITNESS: This exhibit was made up for the
4 trial in 1978, and the fields were measured at that
5 time by Mr. Bill Bennet.

6 Q. (By Mr. Price) Now, you have indicated there are
7 depictions on Exhibit T-W with red X's along the
8 creek; is that correct?

9 A. That's correct.

10 Q. And what do those red X's depict?

11 MR. VEEDER: I am going to object to this. This
12 witness didn't put this in. Did you put this exhibit
13 in yourself?

14 MR. PRICE: He testified to it for a whole day,
15 Mr. Veeder.

16 THE COURT: Just a moment. Isn't this exhibit
17 already in evidence?

18 MR. VEEDER: That's what I'm going to say. I
19 think this is totally cumulative. This is going to --
20 this Exhibit T-W was entered in the trial of the
21 merits, and I don't know why we are into this.

22 THE COURT: Well, why we are into it? I didn't
23 try the first case, Mr. Veeder. If I don't have one
24 way or some way of understanding what you people are
25 talking about, somebody is going to get the bad result.

1 MR. VEEDER: What I would like to say in regard
2 to all this testimony is that there has already been
3 testimony elicited and placed in the record that he
4 can go ahead and testify in regard to additional data
5 that perhaps is not on this exhibit, and that is Your
6 Honor's ruling.

7 Your Honor has said that we can point to the
8 record where the data is available in regard to an
9 exhibit. We can talk about where there is data in the
10 record, but this is going back and retestifying.

11 Now, he should be able to mark in the
12 transcript where this exhibit was offered. He can
13 show the evidence that brought it in, but he is
14 testifying in addition to material that's already in
15 the record, and I object to it.

16 THE COURT: Well, I am going to -- when you are
17 talking about exhibits like this that were introduced
18 in the previous trial, I have to have some understand-
19 ing of what the exhibit demonstrates and I --

20 MR. VEEDER: I thought that's what you said in
21 the order.

22 THE COURT: I am going to, as I said, permit some
23 latitude. I have got to understand this case.

24 The objection is overruled. Mr. Price, go
25 ahead and tell me what that exhibit is and what the

1 X's mean.

2 MR. VEEDER: I interpose another objection. I
3 want the objection to apply to all the rest of the
4 exhibits that have gone in that due diligence is no
5 way involved. These lands passed out of ownership
6 in the 1920's, and this is 25 years afterwards.

7 THE COURT: The objection is overruled. Go
8 ahead, Mr. Price.

9 MR. PRICE: Thank you, Your Honor.

10 Q. (By Mr. Price) Mr. Walton, we were referring to the
11 X's, the red X's on Exhibit T-W. How many of them
12 are there, please?

13 A. Six.

14 Q. All right. At the upper portion of Exhibit T-W,
15 would you point for the Court where the northern
16 boundary line is?

17 A. (Witness complies with request.)

18 Q. Would you point for the Court where your southern
19 boundary of your property is?

20 A. (Witness complies with request.)

21 Q. Now, at the northern boundary property line where you
22 just pointed, first of all, let's go back a little
23 bit. No Name Creek runs through your property; is
24 that correct?

25 A. That's correct.

1 Q And what was the origin, origination of that creek
2 when you came to the property in '49?
3 A It started approximately 200 yards from our northern
4 boundary.
5 Q North of your northern boundary?
6 A That's correct.
7 Q And what has been referred to previously as the
8 Peters' Allotment?
9 A That's correct.
10 Q All right. Did the creek continue to originate and
11 does it continue to originate at that point today?
12 A No, it does not.
13 Q Where does it originate today?
14 A Approximately it is 100 yards north of where the
15 houses are located, or approximately in the middle of
16 Allotment --
17 Q 525?
18 A -- 525.
19 THE COURT: Is that within the boundaries of your
20 land then?
21 THE WITNESS: It originates where the SP arrow
22 points right here.
23 Q (By Mr. Price) On Exhibit T-W?
24 A That's correct.
25 Q And that is within your property?

1 A. That's correct.

2 Q. Okay. In the previous Exhibit SSSS, the only thing
3 you depicted as being irrigated on Allotment 525 was
4 some flood irrigation; is that correct?

5 A. That's correct.

6 Q. All right. Now, if you would go back to the other
7 side, please.

8 How did you affect the sprinkler irrigation
9 that was put into usage in 1950, as depicted on
10 Exhibit RRRR?

11 A. I am not sure I understand your question.

12 MR. VEEDER: I object to that as a totally
13 leading question again. We have this all the time.

14 THE COURT: Just a minute. He didn't understand
15 it anyway, so you are going to have to rephrase it,
16 so we don't need an objection.

17 Q. (By Mr. Price) How did you effectuate sprinkler
18 irrigation as depicted on Exhibit RRRR? How were you
19 able to accomplish that?

20 A. Sprinkler irrigation depicted on Exhibit RRRR was
21 being done by two five horsepower irrigation pumps,
22 electric irrigation pumps, located on the creek, and
23 using water from No Name Creek.

24 Q. Are those depicted on Exhibit RRRR?

25 A. Yes, they are.

1 Q And are they depicted on Exhibit T-W?
2 A Yes, they are.
3 Q What powered those pumps in 1950?
4 A Electricity.
5 Q When did electricity -- when was electricity first
6 available to your property?
7 A It was in 1949, and I believe it was November.
8 Q When your father purchased this property and you came
9 on the property was there any aluminum irrigation
10 sprinkler pipe as part of the property?
11 A No, there was not.
12 Q What kind of power was brought to the property in
13 '49?
14 A Electrical power, single phase, 220 volts.
15 Q From whom was it obtained?
16 A REA.
17 Q What is REA?
18 A Rural Electric company located in Nespelem.
19 Q This is the Nespelem REA?
20 A That's correct.
21 Q Who made that power available to your property, or
22 how did it get to your property?
23 A We cleared the right-of-way for the poles and pur-
24 chased the poles and the line over a 20-year amortiza-
25 tion from the REA.

1 Q. You physically had to clear the land to bring it in?
2 A. That's correct.
3 Q. And you had to make some kind of financial commitment
4 in order to get it, the power to your property?
5 A. We had to guarantee them a certain amount of usage;
6 I do not remember the usage, or give them a check for
7 so much every month.
8 Q. So you had to guarantee them a certain amount of return
9 whether you used the power or not?
10 A. That's correct.
11 Q. And you recall the amount of financial commitment you
12 made?
13 MR. VEEDER: I object to this. How old was the
14 witness at this time now?
15 THE COURT: He's answered the question, Mr.
16 Veeder. He said he didn't recall.
17 MR. PRICE: I think the age limit works both
18 ways, Counsel. We should probably be careful of
19 that.
20 THE COURT: I might say, gentlemen, there is no
21 question of a person's ability to testify as to what
22 he may have recalled at a certain age. It can go to
23 the weight of the testimony, but I think most of us
24 find that we can recall things that happened four
25 years ago better than things that happened yesterday.

1 MR. PRICE: Thank you, Your Honor.

2 Q. (By Mr. Price) Mr. Walton, you used the term single
3 phase power. What does that signify? What other
4 kind of phase is there, if any?

5 A. As I know power, it comes with two -- what's called
6 the two hot wires or three hot wires, and you have
7 what is called the two hot wires or single phase.
8 It limits you to five to seven horsepower, or you
9 have to put in a very expensive system -- what's
10 called an attapower phase to run motors larger than seven
11 horsepower, and two phase it's unlimited to the size
12 of electric horsepower you run.

13 Q. Does it depend -- are there financial considerations
14 as to whether you get single phase or three phase?

15 MR. VEEDER: I object, Your Honor. This is
16 totally irrelevant. It has no meaning whatsoever
17 to the last four questions. I object on the grounds
18 that we are just maybe killing time. There is no
19 reason why we are talking about three-phased power or
20 two-phased power or what it costs or where did it come
21 from. The issue here is due diligence.

22 MR. PRICE: Exactly.

23 MR. VEEDER: And this has nothing to do with it,
24 and I object to this course of questioning.

25 THE COURT: Well, I am going to permit the

1 development of the testimony relating to the bringing
2 in of electrical power.

3 So we have context in the record, the
4 criteria for determining a diligent application of
5 water for the land is one that is, as I believe one
6 of the Judges said, it is an application of common
7 sense to all of the existing circumstances.

8 I am going to permit the parties to develop
9 their testimony in this area. What it means or the
10 significance of it, I will determine later. The
11 objection is overruled.

12 Q. (By Mr. Price) Mr. Walton, do you know whether at
13 the time power -- you brought power into the property,
14 your father or your family had unlimited financial
15 resources?

16 MR. VEEDER: I object to that. There is no
17 basis for this question whatsoever. The witness
18 doesn't know -- what was he -- eight years old by
19 then? Did he know his father's financial condition?

20 THE WITNESS: Mr. Veeder, I --

21 THE COURT: The objection is overruled. Answer
22 the question, if you can, Mr. Walton.

23 THE WITNESS: Yes, I do.

24 Q. (By Mr. Price) What is your answer, please?

25 A. It was very short.

1 Q. What was the source of financial support for your
2 family?

3 MR. VEEDER: May I have a continuing objection
4 on all of this, please?

5 THE COURT: Well, I don't know what that means,
6 but I am going to permit this testimony in any event.

7 THE WITNESS: Selling of milk to -- selling of
8 milk to Medamoor Dairy in Omak.

9 Q. (By Mr. Price) Whatever you could generate from this
10 property in question?

11 A. That's correct.

12 Q. Mr. Walton, do financial considerations have any
13 bearing on how an agricultural property is developed,
14 if at all?

15 A. Yes, they do.

16 Q. Would you have any formal training in that considera-
17 tion as part of your formal education?

18 A. Yes, I have.

19 Q. And where would you have received that?

20 A. In two places: One at Washington State University,
21 and, two, from running a farm for the last fifteen
22 or eighteen years.

23 Q. What are or how do economic factors affect the
24 ability to develop agricultural land, if at all?

25 MR. VEEDER: I am going to object to this line of

1 testimony on the basis of the law of the State of
2 Washington. The rule is very, very explicit in the
3 State of Washington and has been since 1891, and the
4 case you cited to us for review upon which you said
5 you are going to govern the determinations of due
6 diligence, the Big Ben Transit Company, those cases
7 are very, very specific.

8 The rule of law is beyond question that
9 due diligence is not governed by, nor does the fact
10 of whether the witness -- I mean the claimant is rich
11 or poor. The issue of whether a man has the funds
12 to finance or not is not any element whatever in
13 regard to due diligence. The cases are specific in
14 that regard.

15 I will file with Your Honor a brief on
16 this matter, but for now, I am interposing an objec-
17 tion that where we can show that illness, the fact that
18 the man is bankrupt and has no money, the fact that
19 he doesn't have the kind of help that he requires,
20 those issues are not elements to be taken into con-
21 sideration in regard to due diligence.

22 THE COURT: All right.

23 MR. VEEDER: The only elements that can be taken
24 into consideration in regard to due diligence in this
25 aspect of these proceedings are those issues in regard

1 to the kind and type of project that the party intended
2 to construct. If he ran into a lot of rock that made
3 it impossible for him to complete his construction
4 in the spring of the year, the courts are lenient on
5 that, but in regard to a man's health, in regard to
6 a man's financial status, in regard to all of those
7 elements, the courts have been explicit down through
8 the years declaring that it has nothing to do with
9 due diligence.

10 THE COURT: All right, Mr. Veeder. What law
11 will apply here is the question. I have indicated
12 earlier, and I think I have made myself fairly clear,
13 that I am going to allow a certain amount of leeway
14 in the evidence. Now, what the meaning of that
15 evidence is, and what rule of law is applied is my
16 problem to decide eventually.

17 You have an objection to this line of
18 testimony. I have said I am going to allow Mr. Price
19 to develop his theory. That does not necessarily
20 mean that I accept that theory, but your objection
21 is overruled, and we will proceed with the testimony.

22 I think we will take about a ten minute
23 break for our court reporter, gentlemen.

24 (A recess taken at this time.)
25

1 THE COURT: All right, Counsel. You can proceed.

2 Q. (By Mr. Price) Mr. Walton, I believe we were trying

3 to discuss matters of the economic factors as to how

4 they relate to the development of agricultural land.

5 Would you proceed, please?

6 A. Economic factors are the most critical item on how

7 agricultural land is developed. If the crop that you

8 grow does not pay the cost of growing, plus the cost

9 of buying the land, you go broke.

10 Q. How do you determine the amount of acreage you need

11 under irrigation at any given point in time?

12 MR. VEEDER: May I have that read back?

13 (Pending question read.)

14 MR. VEEDER: Could I have the question read back

15 once more?

16 (Pending question read.)

17 MR. VEEDER: I have my objection then on all

18 these questions.

19 THE COURT: Yes. I will treat your objection --

20 MR. VEEDER: As continuing?

21 THE COURT: -- as a continuing objection to the

22 testimony with respect to economic considerations.

23 MR. VEEDER: Thank you.

24 THE WITNESS: I would like to answer that ques-

25 tion in terms of a closed unit, or let's take my place

1 for an example.

2 You count the number of cattle you have on
3 hand, multiply the feed requirements, the estimated
4 feed requirements for the year, times the number of
5 cattle and hopefully you -- then you take the number
6 of acres you have under irrigation, multiply that
7 times the expected yield per acre and hopefully the
8 needs of the cattle and the amount of the crops pro-
9 duced will match. If it doesn't, you are forced to
10 increase your acreage or purchase hay or cut down on
11 your cattle.

12 Q. (By Mr. Price) When you came to the property in '49,
13 and at any time since then, have you or have you
14 observed any other owners or dwellers in the No Name
15 Creek Valley apply water to land just for the purpose
16 of putting water on the land with no other intention
17 of generating a crop or gaining any economic benefit
18 therefrom?

19 A. I have my opinion to why the Tribe irrigates their
20 land.

21 MR. VEEDER: I move to strike the answer. I
22 object to the answer. I don't think he has any
23 basis to begin with. It is not responsive to the
24 question.

25 THE COURT: Yes. I think that objection is proper.

1 We will let the Tribe present testimony on why they
2 irrigate.

3 Q. (By Mr. Price) Mr. Walton, taking you back now to
4 1950, and Exhibit T-W, you have indicated on there
5 two five horsepower pumps in the northern portion of
6 your property; is that correct?

7 A. That's correct.

8 Q. And could you have gone any larger sized pumps at
9 that time with the power that was available to you?

10 MR. VEEDER: I object to the question. Number
11 one, it has to be hearsay; two, he's a seven-year-old,
12 and I don't think he had the capacity to make that
13 determination so he is just guessing. This is plain
14 hearsay all the way through.

15 THE COURT: It is overruled. Go ahead.

16 THE WITNESS: I do know. I cannot determine at
17 that time; however, I do know he had single-phase
18 power.

19 Q. (By Mr. Price) On Exhibit T-W you have indicated the
20 red X's a series of pump installations. What is the
21 latest pump installation from the surface of the
22 creek that is depicted on Exhibit T-W?

23 THE COURT: How come you people didn't use
24 numbers like everybody else? Go ahead.

25 THE WITNESS: We ran out of numbers, Your Honor.

1 There is a location of a 20 horsepower pump located
2 at the end of a sump which is the only irrigation
3 pump I now use to pump out of the creek.
4 Q (By Mr. Price) Okay. Have you depicted on an exhibit
5 the extent of the irrigation on your property after
6 1950?
7 A Yes, I have.
8 Q Would you show that to the Court, please?
9 A 1951.
10 Q Would you identify the exhibit number, please?
11 A Four Q.
12 Q And the green depicts sprinkler irrigation again?
13 A Yes, it does.
14 Q And the blue depicts flood irrigation?
15 A Yes, it does.
16 Q And you indicated 112 total acres on that exhibit?
17 A As I recollect the acreages, and as measured by Mr.
18 Bill Bennet.
19 MR. PRICE: All right. I would offer Exhibit
20 QQQQ into evidence.
21 MR. VEEDER: Excuse me.
22 THE COURT: Yes, you go ahead if you have voir
23 dire, Mr. Veeder.
24
25

VOIR DIRE EXAMINATION

BY MR. VEEDER:

Q I observe you have 112 acres, Mr. Walton. I thought you were claiming 105.

A In 1951, that's an estimation. It is not accurate.

Q It is not accurate?

A Not accurate within .05 percent.

THE COURT: You are saying that's 112 acres more or less.

THE WITNESS: More or less.

MR. VEEDER: Again, I object to all these exhibits. This is hearsay. Mr. Walton has no knowledge whatever as to how those --

THE WITNESS: I changed the irrigation pipe.

MR. PRICE: Just a moment.

THE COURT: Finish your objection.

MR. VEEDER: I want to make it very clear, Your Honor, that we are objecting to this exhibit and the others on a basis of hearsay from Mr. Walton. He didn't do those things himself. He didn't know what acreage was involved. He didn't know what soils -- would you move over just a second?

MR. PRICE: Are you finished?

MR. VEEDER: No, no, no, I'm not finished.

MR. PRICE: All right.

1 MR. VEEDER: There is no basis whatever for the
2 depiction on those areas. There is no description.
3 There is no way for Your Honor to make a determination.
4 There is no way of knowing how much water was utilized
5 or the source of the water.

6 I object to the entire exhibit and I say it
7 is hearsay and I would like a specific ruling on that,
8 Your Honor.

9 THE COURT: Well, the exhibit, as I understand
10 it, is based upon the fact that Mr. Walton has been
11 on the land virtually all of his life, and he is
12 testifying that those are the areas that were under
13 irrigation in 1951. Is that correct?

14 THE WITNESS: That's correct.

15 THE COURT: I assume that the acreage will be
16 confirmed by Mr. Bennet. Is that correct, Mr. Price?

17 MR. PRICE: Only in his previous testimony that's
18 already of record, Your Honor.

19 THE COURT: All right. Well, in any event, I
20 think any objection to this exhibit will obviously
21 go to the weight of the testimony and the objection
22 is overruled. Exhibit QQQQ will be admitted.

23
24 DIRECT EXAMINATION (Continuing):

25 Q (By Mr. Price) What was the source of water for the

1 sprinkler irrigation as depicted on Exhibit QQQQ?

2 A. No Name Creek.

3 Q. Surface water?

4 A. Surface water from No Name Creek.

5 Q. And again, with utilization of pumps?

6 A. The grain was irrigated from electric irrigation pumps.

7 Q. All right. How was the flood irrigation effectuated

8 as depicted on Exhibit QQQQ?

9 A. We had a dam in the creek and a channel. We dammed

10 up the water approximately three to four feet deep

11 and had an overflow channel and a ditch that ran

12 adjacent to the creek and ran it to the head of this

13 field, and then we used rill irrigation on the field.

14 Q. By rill irrigation, what do you mean?

15 A. A large ditch with a large amount of water flowing down

16 it and a number of very small ditches coming from

17 that with water flowing out of the small ditches

18 maybe two to three inches deep.

19 Q. All right. At the present time, how many acres do

20 you have under irrigation approximately?

21 A. Approximately, 105.

22 Q. All right. Is it true that within two years of your

23 father acquiring the property the farming methods

24 employed on your property within that two-year period

25 made it available for you to irrigate approximately

1 112 acres?

2 A. That's correct.

3 MR. VEEDER: I object again. That's a leading

4 question, Your Honor.

5 THE COURT: I think it is a leading question. He

6 has answered it, however.

7 MR. VEEDER: Well, then let's strike the answer.

8 I can't be quite as fast as Counsel, Your Honor.

9 Q. (By Mr. Price) How many acres, Mr. Walton, was the

10 farm able to irrigate and to appropriate water within

11 two years of acquiring the property?

12 A. Within two years of acquiring the property, as I

13 recollect and as measured by Bill Bennet, it showed

14 as my memory serves me, that we were irrigating

15 approximately 112 acres.

16 Q. Okay. You have prepared another demonstrative

17 exhibit regarding irrigation practices on your

18 property.

19 A. Yes, I have.

20 Q. Would you show that to the Court, please?

21 A. Exhibit PPPP.

22 Q. Exhibit four P's. Would you indicate to the Court

23 what is evidenced by Exhibit PPPP?

24 A. Exhibit PPPP represents what is being irrigated in

25 1981, by the use of sprinkler irrigation and flood

1 irrigation.

2 Q Sprinkler is indicated in green and flood in blue?

3 A That's correct.

4 Q Have you changed your irrigation methods and/or
5 practices from 1951, until 1981, as depicted on the
6 latest exhibit?

7 A Yes, we have.

8 Q And what has prompted that?

9 A Economics; trying to grow hay and pasture with the
10 least cost of input.

11 Q Is the source of water as applied in Exhibit PPPP
12 still drawn from surface waters of No Name Creek or
13 from other sources?

14 A From other sources.

15 Q What other sources would those be?

16 A A well located at the northern boundary of my
17 place, and it irrigates these fields, five fields
18 in the northern half of the place.

19 Q The five northernmost fields as depicted on Exhibit
20 PPPP?

21 A Yes.

22 Q Has the change in irrigation methods from all surface
23 diversion to -- well, strike that.

24 Do you still continue to utilize surface
25 diversion for irrigation at this time?

1 A. Yes, I do.

2 Q. So it is a combination of a well and some surface

3 diversion?

4 A. That's correct.

5 Q. Was the purpose of the well to increase the amount

6 of acres that you were putting under irrigation or

7 for some other purpose?

8 A. It was for some other purpose.

9 Q. Mr. Walton, you have indicated by previous exhibits

10 and your own recollection and testimony that there

11 was flood irrigation employed on the property when

12 you first came there and it has been employed by you

13 ever since. Is that correct?

14 A. There was flood irrigation being employed on the

15 property. There was evidence of flood irrigation

16 being employed on the property when I first remember

17 walking on the place, and we employed it in 1949, in

18 certain areas, and we have changed that, but we are

19 still doing it in certain areas at the present.

20 Q. All right. To your knowledge, is there a difference

21 in the quantity of water needed to be utilized in

22 order to meet the plants' consumptive needs as

23 between sprinkler irrigation and flood irrigation?

24 A. Yes, there is.

25 Q. And what is that difference?

1 A. My knowledge arises from my education from Washington
2 State University, and also reading field pamphlets
3 put out by them, and from most indications that I can
4 gather, it takes about twice the amount of water to
5 irrigate an acre of land using rill irrigation than
6 it does sprinkler irrigation.

7 Q. Do you know why that is?

8 A. From watching the water, it seems to flow straight
9 down and the rills are not spread out.

10 Q. Is there any difference in terms of manpower that
11 needs to be employed between sprinkler irrigation as
12 opposed to flood irrigation?

13 A. Yes, there is.

14 MR. VEEDER: Your Honor, again, I object on the
15 basis that it has nothing to do with due diligence,
16 nothing whatsoever. I want the record to show the
17 objection at this point in time.

18 THE COURT: I understand, Mr. Veeder, your
19 position. I am going to overrule your objection and
20 hear the evidence, and I will have to sift out myself
21 what is proper and what is improper.

22 Q. (By Mr. Price) You may answer the question if you
23 can remember what it was; I don't.

24 A. It takes much more labor to use surface irrigation --
25 excuse me -- rill irrigation than it does sprinkler

1 irrigation. You have -- when you are using rill
2 irrigation, you have to be continually replugging
3 some rills, and opening others, and when you harvest
4 the crop you can drive approximately one mile an hour
5 or less over the land that has rill irrigation, and
6 five to six miles an hour over the land that has
7 surface irrigation.

8 Q. In developing the dairy on this property, what was
9 the maximum size of your dairy herd reached?

10 A. 115 milking cattle.

11 Q. And when was that maximum size reached; in what year
12 approximately?

13 A. In 1975, '76.

14 Q. Do you continue to operate the dairy to this day?

15 A. Not the milk cows.

16 Q. When were the milk cows discontinued?

17 A. 1979.

18 Q. Why were they discontinued?

19 A. I didn't have sufficient water to supply them for --
20 I didn't have sufficient water to wash them or to
21 sterilize equipment needed to milk them.

22 Q. Was that a year in which the Federal Marshal was
23 employed to --

24 MR. VEEDER: I object to the question. It's
25 leading.

1 THE COURT: He hasn't finished the question
2 yet. What is the rest of the question?

3 MR. VEEDER: Your Honor, if I wait until the
4 question is asked, the witness will answer the question
5 so I am in a bit of a dilemma here.

6 THE COURT: Well, one reason you are in a bit
7 of a dilemma here, Mr. Veeder, is that to a certain
8 extent a certain amount of leading is not objectionable
9 or troublesome, any more than some evidence which may
10 be technically objectionable but which develops the
11 scenario here so that the Court can better understand
12 it. Any leading question can normally be corrected,
13 but let Mr. Price finish the question and make your
14 objection if it is improper. Maybe you ought to
15 rephrase the question, Mr. Price, or the first half
16 of it.

17 MR. PRICE: Sure. I can.

18 Q. (By Mr. Price) Had the Court made an allocation --
19 let's see -- was there a Court-ordered allocation
20 of water for that year, 1979?

21 MR. VEEDER: Object. It calls for a legal con-
22 clusion. This witness is not qualified to say what
23 the interpretation of a court order might be.

24 MR. PRICE: I didn't ask him to interpret it.

25 THE COURT: Go ahead. I will overrule the objec-

1

tion.

2

Q. (By Mr. Price) Was there a court order allocating water between you and the Tribe that year?

3

4

A. As a layman understands it, yes, there was.

5

Q. And were you required to do anything that year to enforce that order?

6

7

A. Yes, I was.

8

Q. Were your actions timely enough to allow you to retain your herd or not?

9

10

A. My actions were timely enough; the court's actions were not timely enough.

11

12

Q. Did the court ultimately take action to try and assure you of a certain amount of water?

13

14

A. Yes, they did.

15

Q. By the time that order was received had you had to sell your herd or not?

16

17

A. Yes, I had to.

18

Q. Mr. Walton, take your seat, please. I want to talk a little bit about No Name Creek. You have testified that its source is a series of springs at the north of your property; is that correct?

19

20

21

22

A. Its source is a series of springs within the boundaries of my property.

23

24

Q. All right. Is this -- how much water was flowing in this creek when you first came to the property, to the

25

1 best of your recollection?

2 MR. VEEDER: Certainly, I do object to this

3 question. A child of six years old couldn't go out

4 and measure the flow of water and make a determination.

5 THE COURT: I think he said earlier that it was

6 up to your knees, didn't you?

7 MR. PRICE: Where does it come on your legs now-

8 days, Mr. Walton?

9 MR. VEEDER: May I object again? I want to know

10 where this water is located that was up to his knees

11 when he was six years old. I think we have to

12 identify this. I think there has to be something

13 specific in this, Your Honor.

14 Q. (By Mr. Price) Mr. Walton, are you familiar with

15 water quantities?

16 A. Yes, I am.

17 Q. And the measurement of water quantities?

18 A. Yes, I am.

19 Q. And has the United States government been on your

20 property for the last eight or nine years measuring

21 water quantities on your property?

22 A. Yes, they have.

23 Q. Have you been involved in the observations of the

24 measurement of those water quantities?

25 A. Yes.

1 Q Do you know what a weir is?

2 A Yes.

3 Q Do you know what a CFS is?

4 A Yes, I do.

5 Q What is that?

6 A Cubic foot a second, a measurement of water.

7 Q What is a weir?

8 A It's a metal flume that's open at both ends and has

9 a ruler in the center of it, and the water flows through

10 it and you can measure -- it's level, and you can

11 measure the volume of water by the number of inches

12 on the ruler.

13 Q Is your eyesight okay?

14 A Yes, it is.

15 Q Have you been able to observe the creek over the

16 years including the years after you got past the age

17 of six or seven?

18 A Yes, I have.

19 Q And what have your observations been about that creek

20 in terms of the quantity of water that flows over the

21 years; is it constant?

22 A No, it is not.

23 Q From year to year it is not constant?

24 A No.

25 Q And from month to month, is it constant during any

1 given year?

2 A. No.

3 Q. Have there been years in which there has been no
4 flow in the creek?

5 A. No.

6 Q. Have there been years in which the flow of the creek
7 disappears before it reaches Omak Lake?

8 A. That's correct. Yes, there have been.

9 Q. Have there been years in which the flow of the creek
10 has disappeared before it even reaches the southern
11 terminus of your boundary line?

12 A. Yes.

13 Q. Approximately what quantity of water is flowing in
14 the creek at this time?

15 MR. VEEDER: I object to this. I think it is
16 important to know what place on the creek and how
17 this witness makes the determination.

18 THE COURT: That seems fair. Why don't you ask
19 him that?

20 Q. (By Mr. Price) Give me a point; tell me how you do
21 it?

22 MR. VEEDER: I didn't hear what you said,
23 Counsel.

24 MR. PRICE: I asked him to identify a point for
25 the Court and to explain how he measured it pursuant

1 to your request, Counsel.

2 THE WITNESS: The United States Geological Survey
3 was out approximately the 15th of last month. There
4 was no water being pumped into the creek. I stood
5 and watched them use a propeller-type measurement
6 across the creek at our lower boundary, and from my
7 observation his figures were within the ball park,
8 and he stated --

9 MR. VEEDER: I object to this. I have an objec-
10 tion, Your Honor.

11 THE COURT: Just a moment, Counsel. What is your
12 objection?

13 MR. VEEDER: My objection is that he said, "I
14 witnessed a propeller." He said he witnessed a measure-
15 ment. Under those circumstances, Your Honor, I do
16 not believe this witness is qualified, nor could
17 possibly come up with a response to the inquiry that is
18 presented to him.

19 THE COURT: Isn't the government running regular
20 metering of this? Is this really an issue in this
21 case?

22 MR. SWEENEY: Well, Your Honor, I think if Mr.
23 Walton is going to be quoting from USGS, that that
24 would be hearsay.

25 THE COURT: That's correct.

1 MR. VEEDER: That's right.

2 MR. SWEENEY: We can get the figures and present
3 them.

4 THE COURT: That would be acceptable, gentlemen,
5 as far as what relevance it has.

6 MR. VEEDER: Certainly, if it is measured by a
7 qualified person I am delighted to have those in the
8 record.

9 THE COURT: All right. Let's go ahead.

10 Q. (By Mr. Price) Mr. Walton, in the year 1977 -- strike
11 that.

12 In the original trial of this matter in
13 1978, the United States Geological Survey introduced
14 an exhibit, a report into evidence, did they not?

15 A. Yes, they did,

16 Q. And this was regarding their findings regarding their
17 years of testing and measurements?

18 A. The report --

19 MR. VEEDER: May I hear the question? I can't
20 hear the --

21 THE COURT: Do you want to sit over here, Mr.
22 Veeder?

23 MR. VEEDER: No. I would like to sit right here,
24 Your Honor.

25 THE COURT: Well, we are having too many interrup-

1 tions. Mr. Price, you might try to keep your voice
2 up a bit.

3 Mr. Veeder, you can sit down and tell me
4 if you can hear Mr. Price.

5 MR. PRICE: I don't think the microphone --
6 I don't get an indication that it is working.

7 THE CLERK: There is a switch on it.

8 THE COURT: Just try to keep your voice up, if
9 you can.

10 Q. (By Mr. Price) Mr. Walton, in connection with the
11 United States Geological Survey Report introduced
12 into evidence in the original trial of this matter,
13 the United States did attempt to determine the amount
14 of natural flow in the channel apart from any waters
15 being put into the channel by the Tribe; is that
16 correct?

17 A. They did.

18 Q. And as part of that report they did determine that
19 as of the 13th day of May, on one of their given
20 measurements --

21 MR. VEEDER: This is totally a leading question
22 again.

23 THE COURT: Is this report in evidence?

24 MR. PRICE: The report is in evidence.

25 MR. VEEDER: Yes. The report speaks for itself,

1 Your Honor.

2 MR. PRICE: Some of this, Your Honor, in order
3 to try and keep you apprised, it makes sense to have
4 some of this brought to your attention as we go along.

5 THE COURT: I agree.

6 MR. VEEDER: But, then you refer to exhibits,
7 Your Honor.

8 THE COURT: I am going to overrule your objec-
9 tion. If you are referring to an exhibit in the
10 record and the witness can say what's in the exhibit,
11 then I will look at it at the time, but I think it
12 might be helpful, Counsel, you have to keep in mind
13 this case was tried over what period of time, I don't
14 know, by a judge who is now deceased. There has to
15 be some flexibility in calling my attention to
16 exhibits.

17 Now, if there is a dispute as to what the
18 exhibit says, that's another question, or if your
19 objection is a technical one --

20 MR. VEEDER: It is not a technical objection.
21 If he is referring to measurements made by Witness
22 MacNish for the United States Geological Survey, that
23 is one thing, and if MacNish's evidence is going to be
24 utilized here and this witness is going to testify
25 to it, then I think that this witness has to be

1 qualified as an expert in regard to hydrology and he
2 is not that expert.

3 THE COURT: Can you demonstrate this, Mr. Price,
4 by calling my attention to portions of an exhibit in
5 evidence or not?

6 MR. PRICE: I think, Your Honor, the exhibit is
7 in evidence and Mr. MacNish highlighted a portion of
8 it for us, and I would have to get the specific page
9 number and such out indicating the USGS's measurement
10 of the natural flow as apart from the Tribe's water
11 being pumped into the channel.

12 THE COURT: All right.

13 MR. PRICE: I would get that before the Court so
14 that the Court would know that there is a natural
15 flow of water in terms of this developed water question
16 or charge that the Court indicated it might have to
17 consider at some point.

18 THE COURT: All right.

19 MR. VEEDER: It is in the record and I see no
20 reason for this witness testifying to it.

21 Q. (By Mr. Price) Mr. Walton, did your studies at
22 Washington State University cover the history, any
23 history of irrigation practices in the West or in the
24 state of Washington?

25 A. Briefly, yes, it did.

1 Q And to your knowledge, what were the means of irriga-
2 tion prior to the late 1940's?

3 A The means of getting crops to grow with water was
4 utilizing those crops were subirrigation was present
5 and using dams on streams with gravity flow and using
6 one-banger gas pumps, one piston gas pumps.

7 Q Did the state of the art of irrigation practices
8 ever change at some point in time?

9 A It has changed continually since man has been irri-
10 gating.

11 Q All right. Was there any significant change, to your
12 knowledge, after World War II?

13 A Yes, there was.

14 Q And what would that have been?

15 A Electric power and aluminum pipe.

16 Q What difference does aluminum pipe or did aluminum
17 pipe make in terms of irrigation practices?

18 A It is far more efficient to bring water on a field
19 and make fields which were uneconomical to irrigate
20 economical to irrigate. It saved an enormous amount
21 of time in irrigating fields.

22 Q You said electric power was a significant change.
23 What could electric power do that a one cylinder
24 piston gas powered pump couldn't do, if anything?

25 A Electric power is very economical and it's very

1 efficient and it doesn't break down, wear out nearly
2 as fast as gas motors do.

3 Q Is gas motors a low head or high head system?

4 A At present, it can be used for either. I don't believe
5 the high head system came in until after World War
6 II.

7 Q What is a low head or a high head system?

8 A A head means the heighth of water above the pump that
9 the pump is capable of pumping.

10 Q What is the maximum -- do you have a knowledge of the
11 maximum heighth that a one cylinder or one piston
12 gas powered pump could lift water?

13 A No, I do not.

14 MR. PRICE: Your Honor, I would like at this time
15 to offer Defendant's Exhibit UUUU and TTTT as being
16 part of the documents that relate to the historical
17 records of the trust allotments at the time the
18 government was transferring them from trust status
19 to fee simple status. These records have been
20 obtained from the United States government pursuant
21 to answers to interrogatories.

22 THE COURT: Has Counsel seen them?

23 MR. PRICE: I delivered copies to both of them.

24 MR. VEEDER: Where are they?

25 MR. PRICE: Well, I have copies here. The one

1 exhibit, Exhibit UUUU relates to Allotment 525 and is
2 an advertisement for the bidding of the property, and
3 Appendix F relates to Allotment S-894 and is a
4 certificate of appraisalment.

5 These correlate with the exhibits that are
6 already admitted, but for one reason or another were
7 not part of those exhibits.

8 MR. SWEENEY: Which one is the appraisalment?

9 MR. PRICE: F.

10 MR. VEEDER: I mean, is that four U?

11 THE CLERK: Four T.

12 MR. PRICE: TTTT.

13 THE COURT: These are marked as having been
14 admitted in the previous case; is that correct?

15 MR. PRICE: I do not find them in the exhibits
16 that we introduced with those documents, Your Honor.
17 The specific documents did not get into that record
18 for one reason or another.

19 THE COURT: You are putting new numbers on them
20 now?

21 MR. PRICE: Yes. This would not be a duplication,
22 to my knowledge.

23 MR. SWEENEY: As far as Exhibit TTTT and UUUU,
24 the government would have no objection.

25 THE COURT: All right. Mr. Veeder?

1 MR. VEEDER: Well, I think that it is improper.
2 I think I -- I thought this data was already in, Mr.
3 Price.

4 MR. PRICE: I have reviewed those exhibits --

5 MR. VEEDER: But, I would suggest that we take
6 out from the exhibit which I have in my hand is not
7 marked, it's got a big T on it, and I think we shouldn't
8 have it underscored, any underscoring or anything like
9 that because if these are not certified copies, I want
10 to be able to review them myself against certified
11 copies.

12 What I will do is withhold -- like to inter-
13 pose an objection until those reviews have been made
14 and, of course, I am going to ask Counsel to remove
15 any underscoring or any accentuation or any markings
16 at all on the exhibits.

17 MR. PRICE: I have no objection to that, Your
18 Honor.

19 THE COURT: Well, I will admit them at this time
20 subject to your right to verify them, Mr. Veeder, and
21 I will ignore any underscoring.

22 MR. VEEDER: Well, I hope the Appellate Court
23 does, Your Honor.

24 THE COURT: All right.

25 MR. PRICE: Thank you, Your Honor.

1 Q. (By Mr. Price) Mr. Walton, from your knowledge and
2 personal experience of residing on the farm and your
3 own farming experience, do you have an opinion as to
4 whether or not you and your father utilized reasonable
5 effort in putting the available acreage under irriga-
6 tion?

7 MR. VEEDER: I object to the question, Your Honor.
8 I don't think that he can testify as an expert as to
9 whether he and his father did anything right or wrong,
10 and I don't think he is qualified to testify under the
11 circumstances as to what happened, what was going on
12 in his father's mind as to whether this was a proper
13 development or not. I certainly don't think he can
14 say we did everything very, very well in regard to
15 due diligence, and that is what he is being asked to
16 do.

17 THE COURT: Well, it goes to the weight. He has
18 lived on the land virtually all his life. I am going
19 to permit him to answer.

20 THE WITNESS: Yes. I believe we have applied
21 reasonable diligence.

22 Q. (By Mr. Price) Was it or was it not your intention
23 to bring the irrigable lands under irrigation as they
24 became available to you?

25 MR. VEEDER: I want a continuing objection on *this*.

1 This man is six years old and he couldn't formulate
2 an intention.

3 THE WITNESS: Let me answer that question in terms
4 of what I did as owner and part owner of the land.

5 MR. VEEDER: There is no question before the
6 witness on that point.

7 THE COURT: I think perhaps you should put a time
8 frame on it. What is the testimony in the record from
9 Mr. Walton, Sr., on that point? Is that covered in
10 the record?

11 MR. PRICE: There is testimony as to what he did
12 and when he did it, and basically, it is similar
13 testimony as to Mr. --

14 MR. VEEDER: I wish Counsel would speak up. We
15 have a hard time hearing him.

16 MR. PRICE: -- similar to Boyd Walton, but it did
17 not go to questions involving why they did it and when
18 in terms of the diligence factor, and that's why we
19 are trying to elaborate on that aspect.

20 THE COURT: I think Mr. Walton can testify as to
21 -- as far as his intentions were concerned, but I
22 don't think it would be proper for him to testify as
23 to his father's intentions.

24 Again, in this -- the issue involved in this
25 case involves intent, obviously, and it involves a

1 multitude of things, and it is difficult to develop
2 because of the years that have gone by since the
3 property was utilized and been put to irrigation, so
4 I almost have to permit a certain amount of leeway
5 there, but I think Mr. Walton can testify as to what
6 his intentions were and what he did, and perhaps that
7 will establish a case as well as you can through Mr.
8 Walton.

9 MR. VEEDER: And I want a time limit on that,
10 Your Honor, in regard to when he was capable of for-
11 mulating an intention because intent is the most
12 important single aspect in diligence, and we need a
13 time element on this.

14 THE COURT: You can develop that, Mr. Price.

15 Q. (By Mr. Price) Mr. Walton, was it was it not your
16 intention, apart from your father's, to develop the
17 irrigable acreage on this farm?

18 A. Yes, it was.

19 MR. VEEDER: Now, I object to this. This is
20 exactly what I objected to. He couldn't formulate
21 intent at six years old.

22 THE COURT: You can cross-examine him. Go ahead,
23 Mr. Price.

24 Q. (By Mr. Price) Mr. Walton, I ought to get a medal for
25 just keeping my sanity.

1 Are there irrigable acres on your property
2 for which water has not yet been appropriated?
3 A. Yes, there is.
4 Q. And how many acres?
5 MR. VEEDER: Now, is the witness refreshing his
6 memory or what is he doing, Counsel?
7 THE WITNESS: I am trying to get the exact
8 figures. There are approximately 38 acres which can
9 be irrigated.
10 Q. (By Mr. Price) In addition to the 112 irrigated in
11 1951, and in addition to the 106 that are presently
12 irrigated?
13 A. 38 acres is in addition to the 105 as shown on Exhibit
14 PPPP.
15 Q. All right. Where are those located? Can you depict
16 those on Exhibit T-W for us, please, or whichever
17 exhibit would be most demonstrative?
18 A. Okay. On Exhibit PPPP, it would be this field in here.
19 Q. You are outlining the lowest southerly-most southwest
20 portion of the exhibit, and the land depicted in the
21 exhibit; is that correct?
22 A. It's marked Field 1. There would be an additional
23 acreage in here, Field 2.
24 Q. All right. Now, would you --
25 A. The acres here called Field 3 --

1 THE COURT: What's that exhibit number, Counsel?
2 THE WITNESS: PPPP.
3 THE COURT: T as in Tom?
4 THE WITNESS: P as in papa.
5 THE COURT: All right.
6 THE WITNESS: It would be the acres marked in
7 FFFF.
8 Q (By Mr. Price) And why has water not been appropriated
9 for beneficial use on Fields 1 through 4 depicted on
10 Exhibit PPPP?
11 A Trying to maintain my sanity and --
12 MR. VEEDER: I object to that response, Your
13 Honor.
14 THE COURT: I think it probably is a little non-
15 responsive, but --
16 MR. PRICE: We will try again.
17 THE COURT: Let's try again.
18 Q (By Mr. Price) Mr. Walton --
19 A Okay. It was economically feasible in the '70's to
20 utilize these fields; however, the water situation
21 and the people involved in the water situation did not
22 make it feasible.
23 Q Can you explain that? Was that competition or com-
24 peting uses of the water with other people?
25 A Competition and legal, legal reasons.

1 Q Did you have an intention to apply water there if the
2 water were available?

3 MR. VEEDER: Object again. It is a leading
4 question, Your Honor.

5 THE COURT: The question is --

6 Q (By Mr. Price) Did you or did you not?

7 A Economic situation is such that I would apply water
8 there at the present if the legal hassle, the legal
9 problems are ironed out and the water was available.

10 Q Okay. You have been living with litigation on all
11 of the 350 acres minus 12 acres --

12 MR. VEEDER: Another leading question, Your Honor.
13 I object to it.

14 MR. PRICE: -- since 1970, have you not?

15 THE WITNESS: That's correct.

16 THE COURT: Well, I will overrule the objection.
17 The Court can take judicial notice that you have been
18 litigating this for a long time.

19 Q (By Mr. Price) Mr. Walton, in terms of the creek
20 itself, we want to go to a matter of fishery for a
21 moment. Were there trout in No Name Creek when you
22 came to the property in '49?

23 A Yes, there were.

24 Q And how long did trout continue to exist in the creek,
25 up until when?

1 A. 1977.

2 Q. What happened in 1977?

3 A. There was no longer sufficient quantity of water to
4 keep them alive.

5 Q. Lahontan Fishery Program was developed sometime during
6 the course of this litigation; is that not correct?

7 A. That's correct.

8 MR. VEEDER: Object to that. I think, Your Honor,
9 that if we are going to get into that, the litigation
10 was started after the Lahontan Cutthroat -- as long as
11 Counsel is doing this, I am going to, too. That
12 litigation started subsequent to the planning of the
13 Lahontan Cutthroat Fishery, and that's a matter of
14 record. The witness is in error of what he just said.
15 The record will show that.

16 THE COURT: I think that can be established
17 otherwise, can it not?

18 MR. PRICE: Let me rephrase the question. I
19 believe Counsel is right.

20 Q. (By Mr. Price) Mr. Walton, an artificial channel was
21 created after the commencement of this litigation in
22 connection with the Lahontan Fishery in Omak Lake;
23 is that not correct?

24 A. From my observation, the present channel was worked
25 on installing plastic --

1 Q I don't care about the particulars of it. Can you
2 just answer that question, please? Was it done after
3 the initiation of this litigation?
4 A. There was much work done on the channel below me.
5 Q And was water put to irrigation by the Tribe below you
6 after the initiation of this litigation?
7 A. Yes, it was.
8 Q On Allotments 901 and 903?
9 A. That's correct.
10 Q And where does the Tribe withdraw the water that it
11 utilizes on Allotments 901 and 903 in relationship to
12 your property and Omak Lake?
13 A. The Tribe draws the water from wells north of my
14 northern boundary in the No Name Creek Valley.
15 Q Does the Tribe withdraw water below your property
16 for application to Allotments 901 and 903?
17 A. As of yesterday, they do not.
18 Q Up until yesterday they did?
19 A. They do not withdraw water from the ground water table
20 below my property for irrigation.
21 Q I am having trouble. Do not the Tribes have a pumping
22 facility from the surface of the creek below your
23 property?
24 A. Yes, they do.
25 Q Don't they put that water on Allotments 901 and 903?

1 A. Yes, they do.

2 MR. VEEDER: Once again, we have got this leading
3 situation where Counsel is testifying. This whole
4 thing is testifying. He says he has problems. He has
5 problems because his witness doesn't know what he is
6 going to say, apparently. He says, "I've got these
7 problems," so he goes ahead and testifies.

8 THE COURT: State your objection, Mr. Veeder.

9 MR. VEEDER: My objection is that these are lead-
10 ing questions. Counsel is testifying by way of leading
11 questions, and I object to the whole course of conduct.

12 THE COURT: Then, make your objection on the
13 basis that the question is leading and we will proceed
14 with this procedure. I don't want to argue about it.

15 Now, the question was leading and I am going
16 to ask Counsel to rephrase it. Now, you are going to
17 gradually test my patience with all of these objections,
18 Mr. Veeder.

19 Q. (By Mr. Price) Mr. Walton, how has the Tribe in the
20 past few years, or has it withdrawn surface water from
21 No Name Creek below your property for utilization on
22 Allotments 901 and 903?

23 A. The Tribe has withdrawn surface water from No Name
24 Creek for irrigation purposes on 901 and 903.

25 Q. Does it withdraw that water before the water has a

1 chance to flow down this man-made channel, or does it
2 withdraw it after the water has had an opportunity to
3 flow through this man-made channel?

4 A. It withdraws the water before it has a chance to flow
5 into the man-made channel.

6 Q. You have observed this system in operation?

7 A. Yes, I have.

8 Q. And you are familiar with Omak Creek and No Name Creek
9 having lived there most of your life?

10 A. Yes, I am.

11 Q. And is there a method whereby the water that is pumped
12 into No Name Creek by the Tribe north of your property
13 could be allowed to flow through the man-made channel
14 for beneficial purposes for the fish and then be
15 withdrawn for irrigation purposes?

16 A. Yes, there is.

17 MR. VEEDER: I object to the question, Your Honor.
18 This witness is not qualified as an engineer in regard
19 to preparing and developing an irrigation system.
20 I think it is very wrong. I realize Your Honor is per-
21 plexed at my objections. I have to represent my
22 client in any event. I am going to represent my client
23 in any event irrespective of how perplexed Your Honor
24 may be.

25 THE COURT: Counsel, would you listen for a moment?

1 I don't think it is necessary for you to talk for five
2 minutes every time you make an objection. Make an
3 objection and I will rule on it.

4 MR. VEEDER: All right, Your Honor. I have
5 objected to the qualification of this witness to answer
6 a question that has been presented to him.

7 THE COURT: Basing it on the basis that he is
8 unqualified to answer?

9 MR. VEEDER: Yes, Your Honor.

10 THE COURT: Yes, what he is asked to testify to
11 is whether from his observation water could be diverted
12 through the man-made channel rather than bypass it.
13 I suppose he can answer that. I will overrule that.

14 MR. VEEDER: No. I would like to have the ques-
15 tion read back, Your Honor. I would like to have the
16 question as presented, Your Honor.

17 THE COURT: Was that the question as I understand
18 it?

19 MR. PRICE: That was the question.

20 MR. VEEDER: No, Your Honor, it was not --

21 THE COURT: Just a moment. I will ask him a
22 question.

23 As I understand the question to you, Mr.
24 Walton, is whether you are referring to the man-made
25 channel and the testimony you gave that the water is

1 withdrawn before it goes into the man-made channel,
2 and the question is from your observations could it
3 be diverted through the man-made channel?

4 THE WITNESS: May I refer to this map, Your Honor?

5 THE COURT: Yes.

6 THE WITNESS: The southernmost boundary of my
7 place -- this is what's called the granite lip. The
8 Tribe has an irrigation pump located in the creek
9 to withdraw the water approximately here. The man-
10 made channel is approximately here to here.

11 It is my belief and my understanding of the
12 situation, as I see it, it would be just as easy to
13 take this pump and move down here and utilize the
14 water for two functions instead of one.

15 THE COURT: All right.

16 MR. VEEDER: Now, was my objection in the record
17 and had you ruled on it when the witness testified?

18 THE COURT: Well, you didn't object to my question,
19 but I will put an objection in there if you want.

20 MR. VEEDER: Well, I certainly want it in there.
21 I was afraid to, Your Honor.

22 THE COURT: Well, then, we will consider that
23 the question that I asked was subject to an objection
24 by Mr. Veeder.

25 Q. (By Mr. Price) Mr. Walton, with respect to the develop-

1 ment, economics, if you will, of the No Name Creek
2 Valley, how many families have lived or resided there
3 at any given time during the course that you have
4 resided in No Name Creek Valley?

5 A. We should call the No Name Creek Valley the valley
6 below Omak Creek to Omak Lake, the northern part of
7 Omak Lake.

8 Q. You are pointing to Exhibit T-W?

9 A. That's correct.

10 Q. Omak Creek to the northernmost portion of the map.

11 A. That's correct.

12 Q. Omak Creek?

13 A. Yes.

14 Q. To the southern point of where No Name Creek runs into
15 Omak Lake at the southern portion of the exhibit?

16 A. That's correct.

17 Q. Okay.

18 A. Approximately four.

19 Q. Has there been to your knowledge any large residential
20 development or subdivision ever in that area?

21 A. No, there has not.

22 Q. Has there ever been to your knowledge any beginning
23 of land owners for the organization of taxing districts
24 or development of irrigation districts within that
25 area?

1 A. Yes, there has.

2 Q. What would that have been?

3 A. From the briefs the Tribe has filed --

4 MR. VEEDER: I would object to the answer. It
5 is not responsive. He can't quote from a legal brief
6 in responding to this question.

7 THE COURT: I think that is a fair objection.

8 MR. PRICE: That's true. Just answer from your
9 own personal knowledge.

10 THE WITNESS: Yes. Yes, there has been.

11 Q. (By Mr. Price) Has there been any economic center
12 developed in this area in terms of a town site as
13 such?

14 A. No, there has not.

15 Q. Has there been any commercial center developed in
16 this area, general delivery, stores, hardware stores
17 or anything of a commercial nature?

18 MR. VEEDER: I object, Your Honor. This question
19 is totally irrelevant and has nothing to do with due
20 diligence.

21 THE COURT: I will overrule the objection. I
22 don't know that it has much to do with anything, but
23 I will permit Mr. Price to develop the background
24 that he feels necessary to develop.

25 MR. PRICE: Your Honor, if I might call your

1 attention to and I might ask the Court to keep these
2 matters in mind is you have referred to the Big Bend
3 case which refers us to the Alpoa Creek case, which
4 talks about the factors of due diligence in part
5 being, quote, "As to what may be considered reasonable
6 diligence in putting appropriated waters to a bene-
7 ficial use must depend on a large extent on circum-
8 stances. The lands in question are sparsely settled
9 and located far from any trade centers. The creek
10 is small, and there is water insufficient for all
11 purposes. The country and the vicinity has, because
12 of its character and remoteness from civilization,
13 developed very slowly, yet, under all these adverse
14 conditions, some irrigation is carried on."

15 That case and those factors were utilized
16 for the proposition that a water right could be
17 developed with reasonable diligence over a 30-year
18 period.

19 THE COURT: Yes. That's why I have been permitting
20 you to develop this background, Mr. Price.

21 MR. PRICE: I appreciate that, but Counsel seems
22 to take a different view and I am trying to abide by
23 the Court's directives in what may be pertinent for
24 your ruling in this matter. I am not attempting to
25 take us on any tangents.

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THE COURT: All right.

MR. PRICE: I need a break. Thank you, Mr. Walton.

THE COURT: All right. Gentlemen, cross-examination.

CROSS-EXAMINATION

BY MR. SWEENEY:

Q I don't recall which was the first exhibit that you turned to.

A. 1949?

Q. Yes. If you would turn to that one, please.

A. Exhibit SSSS.

Q Is that Exhibit SSSS?

A. Yes.

Q Now, on Exhibit SSSS you have indicated two areas which also indicate on the exhibit that they are flood irrigated in 1949, and then have a total acreage of 32 acres?

A. That's correct.

Q The northerly portion of the shaded area, about how many acres are in each one of those parcels? Were they approximately equal?

A. I do not remember the exact breakdown. All I remember is the total acres of the combined till. I would have

1 to go back in my notes at home which have the break-
2 down.
3 Q And how is the northerly shaded area irrigated at that
4 time in 1949?
5 A. From Omak -- excuse me -- No Name Creek.
6 Q How is the water taken out of No Name Creek and put
7 on the land?
8 A. There was a dam located right by the spring area and
9 a small ditch which circled around and came into it
10 here.
11 Q Was it just -- was it an improved ditch? Did it have
12 a channel?
13 A. Man-made ditch.
14 Q It wasn't lined?
15 A. No.
16 Q There was no pipe in it?
17 A. In one spot there was pipe.
18 Q And you don't know who put that in; is that correct?
19 A. No, I do not.
20 Q And then it was gravity irrigation when it reached
21 that portion of the property?
22 A. Yes, it was.
23 Q Where is that in relation to where your present house
24 is?
25 A. It would be south. It would be the field south of

1 the house.

2 Q. That's the one directly to the south?

3 A. That's correct.

4 Q. And how many acres are irrigated in that field at this

5 time?

6 A. Fifteen.

7 Q. Could I direct your attention to Exhibit TTTT, as in

8 tiger? It is an advertisement for Allotment 525. No,

9 excuse me. It is the certificate of appraisement, if

10 I might have this handed to Mr. Walton.

11 MR. SWEENEY: May I approach the witness, Your

12 Honor?

13 THE COURT: Yes. Go ahead, Mr. Sweeney.

14 Q. (By Mr. Sweeney) I am also handing you Defendant's

15 Exhibit UUUU.

16 MR. SWEENEY: I would advise the Court that I

17 got mixed up as to which one was which, and Exhibit

18 UUUU is the advertisement; is that correct?

19 THE COURT: Yes.

20 Q. (By Mr. Sweeney) That is the advertisement for

21 Allotment 525?

22 A. That's correct.

23 Q. And it talks about five acres of irrigable land.

24 A. Yes. It might be irrigated from the creek.

25 Q. There is an additional reference to an acreage of what?

1 A. "And 15 acres additional can be farmed."
2 Q. Fine. Now, the area shown on the exhibit that is
3 Exhibit SSSS, now that shows approximately how many
4 acres in the upper portion of 525?
5 A. Approximately 15.
6 Q. I see. That is where?
7 A. Approximately here.
8 Q. And that is where 525 was; is that correct?
9 A. That's correct.
10 Q. Now, going back to the Exhibit SSSS, the lower area
11 that was flood irrigated in 1949, where was the water
12 source for that?
13 A. A spring located to the east of the field.
14 Q. I see. Is that spring still there?
15 A. Yes, it is.
16 Q. Does it still flow?
17 A. Yes.
18 Q. Was there any development of that spring as in 1949?
19 A. Yes, there was.
20 Q. And what does that consist of?
21 A. A ditch running from the spring around the side of
22 the hill coming out at the highest point of the field.
23 Q. And was that just a regular ditch that was put in?
24 There wasn't any improvement of the ditch much by
25 way of pipes or anything?

1 A. There was a small length of pipe, but it didn't extend
2 the full length of the ditch.

3 Q. Was there a box around the spring?

4 A. No.

5 Q. Is that spring -- is it still used by you for irriga-
6 tion purposes?

7 A. Yes, it is.

8 Q. Has there been any development of that since 1949?

9 A. Yes, there has been.

10 Q. And what does that consist of?

11 A. A total pipe system.

12 Q. So you piped the whole length of the channel from the
13 stream to the field; is that what you are saying?

14 A. That's correct.

15 Q. How many acres are irrigated in that field?

16 A. Can you rephrase your question?

17 Q. Excuse me. How many acres are irrigated -- well, let
18 me go back.

19 Do you know how many acres were being
20 irrigated in that field from the spring in 1949?

21 A. From my recollection as to size of the field and being
22 measured by Mr. Bill Bennet, there were 32 acres total
23 being irrigated, and I believe they were approximately
24 the same.

25 Q. So, you would say 15 or 16 in each field?

1 A. Somewhere in that neighborhood.

2 Q And so that would include the 15 or 16 in 525, Allot-

3 ment 525 to the north, and about 15 or 16 in the lower

4 field from the spring?

5 A. That's correct.

6 Q Now, the next exhibit was QQQQ, I believe, or one of

7 the next exhibits is QQQQ.

8 A. Exhibit RRRR.

9 Q Oh, excuse me. That was 1950. Was there electricity

10 at your ranch at that time?

11 A. Yes, there was.

12 Q And when was the electricity brought to your ranch?

13 A. In 1949, the fall of 1949.

14 Q And was that the Nespelem REA?

15 A. That's correct.

16 Q Now, where did they bring the power in from to your

17 ranch?

18 A. Grand Coulee Dam.

19 Q Well, that's the ultimate source, I imagine, but was

20 there electricity at St. Mary's Mission at that time?

21 A. That's correct.

22 Q Before you had it on your ranch?

23 A. That's correct.

24 Q And that's to the north of your ranch, St. Mary's

25 Mission?

1 A. Yes.

2 Q. And about how far to the north from your property is

3 St. Mary's Mission?

4 A. Two miles.

5 Q. And did the Nespelem REA bring the power, extend it

6 from the St. Mary's Mission to your property?

7 A. May I clarify this?

8 Q. Yes.

9 A. We requested the PUD extend the power from St. Mary's

10 Mission to our place. They said, "No, we only

11 service towns and those types of locations," so then

12 we requested from the REA, and it came approximately

13 eight miles -- seven miles.

14 Q. I see, from their closest --

15 A. Junction.

16 Q. -- line that they had?

17 A. Yes.

18 Q. Now, in 1950, it shows approximately 67 acres irrigated

19 on your exhibit; is that correct?

20 A. That's correct.

21 Q. Once again, do you know the differences between the

22 sprinkler irrigated fields and the fields to the

23 south that apparently was flood irrigated?

24 A. I know them. I do not have that information in front

25 of me.

1 Q. Could you give us an approximate number of acres?

2 MR. VEEDER: I would object to this, Your
3 Honor. The witness has said he doesn't know. I
4 don't think we should be coaxing guesstimations out
5 of the witness, and that's what it amounts to.

6 THE COURT: I think Mr. Walton ought to be able
7 to approximate the size of those areas.

8 MR. VEEDER: He said he didn't know, Your Honor.

9 THE COURT: Well, witnesses sometimes say things
10 like that. Obviously, I don't think he does know.
11 I don't think any of you know precisely what these
12 acreages are, but if Mr. Walton can give a reasonable
13 estimate, that was the thrust of your question, wasn't
14 it?

15 MR. SWEENEY: That's all. I was trying to get an
16 estimate between the two different types of irriga-
17 tion.

18 THE COURT: Now, if you can't do it, Mr. Walton,
19 you need not attempt to.

20 MR. PRICE: Your Honor --

21 THE WITNESS: Approximately 40 --

22 THE COURT: Just a moment. Mr. Price wants to
23 speak now.

24 MR. PRICE: We did go through this in 1978, once
25 before and I believe if the witness looks at Exhibit

1 T-W, I believe the acreages did go in at that time.
2 They may not relate to 1950, but I would call that
3 to the witness's attention. It may speed things up.

4 THE COURT: All right.

5 Q. (By Mr. Sweeney) Maybe I can ask this then: Are the
6 fields that are indicated on the exhibit for 1950,
7 which is Exhibit RRRR, are those fields -- do they
8 appear on Exhibit T-W?

9 A. Yes, they do.

10 Q. And are the field sizes approximately the same?

11 A. Approximately.

12 Q. And T-W was entered in the previous hearing in 1978.

13 A. Yes, it was.

14 Q. Now, on T-W, does that show all of the irrigated
15 property that you eventually brought under irrigation?

16 A. No, it does not.

17 Q. How many acres are reflected on T-W, if you know?

18 A. 100.

19 Q. By the way, as to those fields that were indicated as
20 being irrigated in 1949, at the time that your father
21 acquired the property and you came to live there, what
22 type of crops were grown on the irrigated parcels?

23 A. In 1949, it was grass.

24 Q. Alfalfa?

25 A. Grass.

1 Q. Would you call that pasture land?

2 A. No.

3 Q. Improved pasture land, would you call that?

4 A. Hay land.

5 MR. VEEDER: I think the witness has answered
6 that.

7 THE COURT: What was the answer?

8 THE WITNESS: Hay land.

9 MR. SWEENEY: I have no further questions. Thank
10 you.

11 THE COURT: All right. Mr. Veeder?

12

13

CROSS-EXAMINATION

14

BY MR. VEEDER:

15

16 Q. Mr. Walton, throughout your testimony you have
17 referred to the work that Mr. Bennet did in calculating
18 acreages; is that correct?

18

A. That's right.

19

Q. And you didn't make any calculations yourself?

20

A. Yes, I have.

21

22 Q. I mean, well, what did you do? What were your calculations?

23

A. May I explain this, Your Honor?

24

THE COURT: Yes.

25

THE WITNESS: Let's just call this one particular

1 field that's being irrigated by aluminum irrigation
2 pipe. I know for a fact that aluminum pipe is 40 feet
3 long. It is moved every setting. There will be a
4 setting here, a setting here, and that is a distance
5 of 60 feet. If it takes 11 pipe to reach here, and
6 12 settings to go from this end to this end of the
7 field, I have a very close estimate of the number of
8 feet this is; the number of feet that is. I multiplied
9 the two together and divided by the number of feet in
10 an acre.

11 THE COURT: Okay.

12 MR. VEEDER: Your Honor, I would like to have you
13 look at Tribe's Exhibit 8, and then I will hand it to
14 the witness.

15 THE COURT: Is that in evidence?

16 MR. VEEDER: That is in evidence, Your Honor.

17 THE COURT: Is Counsel familiar with what it is?
18 It is a --

19 MR. VEEDER: Photograph.

20 THE COURT: -- appears to be a photograph of a
21 field with sprinklers in action on it. All right.

22 MR. PRICE: I think I am familiar with it.

23 THE COURT: What is that exhibit number, Mr.
24 Veeder?

25 MR. VEEDER: That is Exhibit 8, March --

1 THE COURT: That's all right. Just so I have a
2 number on it. You have seen it?
3 MR. PRICE: I think I am familiar with it,
4 Counsel.
5 Q (By Mr. Veeder) Mr. Walton, I hand you an exhibit
6 in the record marked 8, and I ask you to state into
7 the record where that particular tract of land is that's
8 depicted in that photograph? Where is that situated?
9 A. It's -- using the Map T-1, it would be --
10 MR. PRICE: Excuse me. I think it is T-W for the
11 record.
12 THE WITNESS: Exhibit T-W.
13 MR. PRICE: We will try to keep this straight here.
14 THE WITNESS: It would be the field marked 20
15 acres, approximately half in the middle of my land.
16 Q (By Mr. Veeder) Now, the exhibit discloses that you
17 are irrigating by a sprinkler system large areas that
18 are wet and you can see water standing there. Is
19 that not correct? Can't you see water standing there?
20 A. I see very small ponds of water standing there.
21 Q And you have got a sprinkler going there; isn't that
22 correct?
23 A. That's correct.
24 Q Now, why would you be irrigating areas that are
25 obviously boggy and swampy? Why would you be doing

1 that?

2 MR. PRICE: Your Honor, I would interpose an
3 objection. It is not pertinent to this proceeding
4 in terms of the Tribe is complaining about his
5 irrigating, and now we are on due diligence as to why
6 he is -- when he started irrigating. Why he may be
7 irrigating is not the question. Was he or was he
8 not irrigating is the question.

9 THE COURT: Well, I assume Mr. Walton has a
10 reason for irrigating it. I will overrule the
11 objection.

12 MR. VEEDER: I would like to have a response to
13 all this argument.

14 THE COURT: You don't have to respond because I
15 overruled the objection.

16 MR. VEEDER: Well, the question is very important,
17 Your Honor.

18 THE COURT: Well, go ahead and ask him the ques-
19 tion. He either will or will not.

20 THE WITNESS: Let's take this as a hypothetical
21 field.

22 MR. VEEDER: Will you answer the question, please?

23 THE WITNESS: I will if you just --

24 THE COURT: Just a minute, gentlemen. Hold it.
25 The question was, as I understand it, why would you

1 irrigate a field which appears to be already wet?

2 MR. VEEDER: That's right.

3 THE COURT: And the witness is prepared to answer
4 the question, so go ahead, Mr. Walton.

5 THE WITNESS: Let's take this as a hypothetical
6 field. On my place, the ground conditions vary from
7 one end to the other. You manage this as an entire
8 unit, and then you apply a management position that
9 we yield the greatest profit for the entire unit.

10 You also manage it for the amount of effort
11 you have to put into it. Some locations of this field
12 are very good; deep, sandy soil. Other areas can
13 be very swampy; very, heavy soil. You cannot plug
14 the sprinklers as you come into an area of heavy
15 soil. You run the line all the way across the field
16 and turn on the whole line.

17 Some areas of that field will get too much
18 water, other areas will not get enough. You hopefully
19 apply the average that the entire unit takes.

20 THE COURT: All right.

21 Q. (By Mr. Veeder) Now, would you state into the record
22 if you have knowledge as to the depth of ground water
23 in the area that is depicted in Tribe's Exhibit 8?
24 How deep is the ground water where you are irrigating
25 the land?

1 MR. PRICE: When are we talking about, Counsel?

2 MR. VEEDER: We are talking about -- I will make
3 it easy for you. August, 1979. August 6, 1979.

4 THE WITNESS: I did not measure it at that time.
5 If you want a farmer's estimate, I will be glad to
6 give you that.

7 Q. (By Mr. Veeder) Would you tell us the reason for
8 irrigating the wet areas as depicted from the pipeline
9 on down the gradient there?

10 A. To make money.

11 Q. And you are irrigating the wet land?

12 A. No. Irrigating -- the wet land has already been
13 irrigated.

14 Q. Now, I hand you --

15 MR. VEEDER: Your Honor, here is Tribe's Exhibit
16 7. It is a photograph of another area of the --

17 THE COURT: Would you state, Mr. Veeder, the
18 purpose of this evidence?

19 MR. VEEDER: Yes. One of the important elements
20 in the Remand here is to demonstrate the amount of
21 water beneficially used. The fact is the word
22 "amount" is stressed in the Remand. We are demon-
23 strating here historic waste of water.

24 Q. (By Mr. Veeder) Now, would you state into the record
25 where the exhibit -- may I have it just for a second --

1 where the land is situated as depicted and set forth
2 on Colville's Exhibit No. 7? Where is that situated?

3 MR. PRICE: Your Honor, I would like to have an
4 objection on that. This is not relevant, and I
5 quoted Your Honor in my opening statement the require-
6 ment on Remand by the 9th Circuit, and it does not
7 go to the question of whether he is putting too much
8 water on a wet area or not. It goes to determining
9 the reasonable irrigable acres, and when he appro-
10 priated it.

11 MR. VEEDER: May I read the Remand to Your Honor?
12 (Reading.)

13 "On Remand, it will be determined the
14 number of irrigable acres Walton owns and the amount
15 of water he appropriated with reasonable diligence."

16 Now, it is an elemental principle of western
17 water law that the waste water is not an appropriation
18 of water, and we are offering this evidence here and
19 we are eliciting this testimony to demonstrate that
20 there has been an historic waste of water by the
21 Defendant Waltons.

22 MR. PRICE: Not as of 1979, Your Honor. Our
23 evidence is that this water was put to use back in
24 1951, at the latest the total of irrigated acres, and
25 an item of particular irrigation on a particular day

1 in 1979, does not go to any pertinent matter.

2 THE COURT: Well, I am aware, Counsel, that there
3 has been -- there have been contentions, apparently,
4 on both sides of the litigation that the other party
5 is wasting water. I don't know that I really see
6 the significance to this, but I think I will permit
7 Mr. Veeder to make his record within reasonable time
8 frames. The testimony so far is that he irrigates
9 these fields in a process of moving the system, and
10 sometimes some of the areas get too much water. That's
11 all I have heard so far, but go ahead, Mr. Veeder.

12 I understand your objection, Mr. Price, and
13 it may well be that this isn't relevant, but I think if
14 I am going to be consistent in this case I want to allow
15 both parties some reasonable latitude in making their
16 record.

17 MR. PRICE: Thank you, Your Honor.

18 THE COURT: The question now is simply where the
19 property on Exhibit 7 is located, right?

20 MR. VEEDER: Yes.

21 Q. (By Mr. Veeder) Would you state into the record where
22 that property is located?

23 A. It's located in the No Name Creek Basin. It represents
24 both the Tribal property and my property.

25 Q. And is that the sump?

1 A. No. It represents a large picture of both Tribal
2 property and my property.
3 Q. Would you state whether you can see water in that
4 picture or not --
5 A. Yes, I can.
6 Q. -- standing in the fields?
7 A. There is water in the picture.
8 Q. There is water standing in the picture; isn't that
9 correct?
10 A. There is water in the field.
11 Q. Now, would you state into the record -- you see this
12 brown area here? Would you state into the record what
13 that brown area is right below where the water is
14 situated?
15 A. It's pasture.
16 Q. And what kind of growth is that?
17 A. Pasture.
18 Q. I am asking you what is the ground growth in there;
19 what is it?
20 A. It's called tall wheat grass.
21 Q. Tall wheat grass. Could it be rye?
22 A. No.
23 Q. Rye grass?
24 A. No.
25 Q. I hand you another exhibit marked 6.

1 MR. VEEDER: Your Honor, if you want to see
2 this exhibit --

3 THE COURT: All right.

4 Q. (By Mr. Veeder) Now, would you state into the record
5 there the area depicted on there as it relates to the
6 Walton property, where is that situated?

7 A. It represents the area on T-W as indicated by 1-A and
8 6-A.

9 Q. Yes. Now, on this Exhibit 6, do you find on there
10 any irrigation pipelines or sprinklers?

11 A. I find irrigation, but no pipelines or sprinklers.

12 Q. Yes. Would you state whether you see standing water
13 there without any pipelines and sprinklers? Isn't
14 it an extremely high water table there, Mr. Walton?

15 A. No. I am irrigating by a method of flood irrigation.

16 Q. And where is the flood irrigation coming from, Mr.
17 Walton?

18 A. No Name Creek.

19 Q. What part; where is it? Is it out of what we have
20 been calling your D-1 and D-2 diversions?

21 A. I am not familiar with the name of it. It is the
22 diversion located at the north end.

23 Q. Let's see where it is. You have been referring to
24 what is your Exhibit T-W. Where would your water be
25 coming from?

1 A. No Name Creek at diversions above the fields I have
2 marked 1-A and 6-A, the northern boundary of those
3 fields.
4 Q. Now, I hand you another exhibit, Exhibit 10.
5 MR. VEEDER: Let the record show that the Court
6 has observed the exhibit, Exhibit 10.
7 Q. (By Mr. Veeder) Would you state into the record
8 where that is situated on your property, and then
9 because we have been using this format, would you
10 refer to the location on T-W?
11 A. This is a field in T-W on my property that I have
12 marked at the southern end of my property as 6-A, and
13 it depicts flood irrigation of the field.
14 MR. VEEDER: Now, I hand to the Court Colville
15 Exhibit 3.
16 Q. (By Mr. Veeder) Would you state into the record where
17 that property is situated as depicted on Colville
18 Exhibit 3 as it relates to your T-W?
19 A. It depicts -- what was your question again?
20 Q. Where is it located?
21 A. On my property?
22 Q. Yes.
23 A. In a field that represents a small portion of the field
24 marked 20-A on T-W.
25 Q. And where is that located as it relates to your sump?

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Is that above or below the sump?

A. In the middle of it. The sump is in the field.

Q. And the sump is very largely on Tribal land; isn't that correct?

A. That is not correct.

Q. How much is on Tribal land; do you know?

MR. PRICE: Your Honor, I object. It has no relevancy to this procedure at all.

MR. VEEDER: What?

THE COURT: He said he has no relevancy.

MR. VEEDER: I think that trespass is very important, Your Honor, and part of this right is being claimed on the basis of trespass, and I think it is going to be very much a part of this case.

THE COURT: Well, go ahead. The answer was that you were incorrect on it, so --

Q. (By Mr. Veeder) Are you saying into the record, Mr. Walton, that some of the sump is not on Tribal land?

A. That's correct.

Q. Mr. Walton, I hand you Exhibit 4. I hand it to the Court for review. That is Colville Exhibit No. 4.

Now, will you state into the record the kind of growth -- first, identify the area on T-W, and then state into the record the growth that appears on that area.

1 A. T-W, the picture I have in front of me represents two
2 fields on T-W. It represents the field I have marked
3 1-A, and also a field which is unmarked, and also
4 represents --
5 Q. When you say unmarked, would you please state is it
6 in the southeast corner of the --
7 A. Southern end of my place.
8 Q. Southern end of the --
9 A. Walton property.
10 Q. -- property.
11 A. And, also --
12 Q. Well, what is the growth?
13 A. And also represents a field adjacent to the one marked
14 3-A.
15 Q. And what is the growth on -- as depicted in the photo-
16 graph?
17 A. Tall wheat grass.
18 MR. VEEDER: I have no further questions.
19 THE COURT: All right. Is there any redirect,
20 Mr. Price?
21 MR. PRICE: Briefly, Your Honor.
22
23 REDIRECT EXAMINATION
24 BY MR. PRICE:
25 Q. Mr. Walton, are you familiar of your own personal

1 knowledge of whether or not there was a flood
2 occurrence the year prior to you and your father
3 coming to the property?

4 A. I saw visual signs of a flood occurring the year we
5 moved on the property.

6 Q. And do you know where the water came from in that
7 flood?

8 MR. VEEDER: May I have the time period in this,
9 please?

10 THE COURT: I think he said it was the year he
11 came upon the property.

12 MR. PRICE: He saw evidence of a flood the year
13 he came upon the property.

14 THE COURT: All right.

15 Q. (By Mr. Price) Do you know the source of the water?

16 A. I was not there --

17 MR. VEEDER: Now, just a moment. This is hearsay.

18 THE WITNESS: I was not there when the flood
19 occurred.

20 MR. VEEDER: Now, just a moment. I object to it.

21 THE COURT: We are not going to talk to two
22 people at the same time. The question is does he
23 know the source of the water, and he may or may not.
24 I don't know.

25 MR. VEEDER: Your Honor, I would like to be heard

1 on this. This has to be hearsay.

2 THE COURT: No, not the question of whether he

3 knows it or not. You are anticipating the next ques-

4 tion. Go ahead, Mr. Price. Do you know or don't you?

5 THE WITNESS: I can surmise.

6 THE COURT: Well, we don't want you to surmise.

7 MR. VEEDER: Object to that.

8 THE COURT: If you don't know or unless there is

9 only one logical explanation for it.

10 THE WITNESS: There's only one logical place.

11 MR. PRICE: What is the logical source of that --

12 MR. VEEDER: I renew my objection.

13 THE COURT: I will overrule the objection.

14 Q. (By Mr. Price) Where is it?

15 A. Omak Creek.

16 Q. What evidence of a flood, that a flood had occurred

17 did you observe on your property, on the Walton

18 property?

19 A. In the northern part of my property as depicted by

20 T-W, there was large amounts of soil removed from the

21 creek bed, undergrowth torn out, and on the lower

22 property there was sand deposited as far as 40 feet

23 from the creek bed in the adjacent fields.

24 Q. Was there or was there not any evidence of disturbance

25 of any previous man-made diversions?

1 A. Yes, there was.

2 Q. What would those have been?

3 A. They were removed --

4 Q. Can you --

5 A. -- in the creek bed.

6 Q. Can you tell us in relationship to Exhibit T-W what
7 you observed?

8 MR. VEEDER: Again, Your Honor, I don't know what
9 to do. You chastise me when I object. Here is a man
10 guessing at what transpired. He is six years old and
11 he is trying to testify in regard to an irrigation
12 system or whatever it was that existed concerning
13 which he had no knowledge because whatever was there
14 was destroyed before they went on the land, and at that
15 time he was five years old.

16 THE COURT: He was six years old, I think.

17 MR. PRICE: Six.

18 THE COURT: Well, as I understand it, he is
19 testifying as to what he observed at the time.
20 Doesn't that go to the weight?

21 MR. VEEDER: No, no, no. I would like to have
22 the question read because that was not the question.

23 THE COURT: What was the question, Mr. Price?

24 MR. PRICE: That was the question.

25 MR. VEEDER: Let's have it read.

1 MR. PRICE: I asked him what he observed as
2 evidence of any destruction.

3 MR. VEEDER: Now, I don't want him to answer
4 before I get the record straight on this.

5 MR. PRICE: Go ahead and get it straight.

6 MR. VEEDER: Because I want to have the question
7 asked again.

8 THE COURT: Okay. Let me try again. I will ask
9 Mr. Walton a question.

10 You indicated, Mr. Walton, and you can object
11 to this when I finish, you indicated, Mr. Walton,
12 when you first came upon the land that you saw evidence
13 that there had been flooding in the northern portion
14 of the property.

15 THE WITNESS: That's correct.

16 THE COURT: All right. Now, what did you observe
17 that constituted that evidence of flooding?

18 Now, do you want to -- is that objectionable?
19 Make your objection if you wish. I am not being
20 facetious. You can object to my questions just as
21 well as Counsel's.

22 MR. VEEDER: Well, I think now your question
23 is repetitious.

24 THE COURT: All right. Well, then he has
25 testified that he saw --

1 Well, the objection is that it is repetitious.
2 I will overrule the objection. You can answer the
3 question.
4 THE WITNESS: Large amounts of dirt and under-
5 growth removed on the northern part of the boundary
6 and up to this much sand deposited along the creek
7 bank in the southern part of the property.
8 THE COURT: All right. Now, do you want to
9 continue, Mr. Price, or are you through?
10 MR. PRICE: Well, I would like to, Your Honor.
11 Q. (By Mr. Price) Mr. Walton, did you or did you not
12 observe any affect to any man-made improvements on
13 the property at that time?
14 A. Those man-made improvements within the creek bed that
15 might have been used for irrigation --
16 MR. VEEDER: I object to this. I object to
17 this.
18 THE WITNESS: -- were removed.
19 Q. (By Mr. Price) How was this evidenced? What did
20 you observe?
21 A. Broken pieces of lumber, support braces washed over.
22 Q. In what portion of the property?
23 A. Northern portion.
24 Q. On Exhibit T-W, can you locate it in relation to any
25 of the fields that are marked there?

1 A. Right adjacent to the area that I have marked SP.
2 MR. PRICE: That's all I have. Thank you, Mr.
3 Walton.
4 THE COURT: All right. Is there any recross
5 now, gentlemen?
6 MR. VEEDER: No thanks.
7 MR. SWEENEY: No, Your Honor.
8 THE COURT: All right. I guess you are finished,
9 Mr. Walton. I think we will go ahead and adjourn for
10 lunch. We will try to crank up at about 1:30, gentle-
11 men. Is that acceptable?
12 MR. VEEDER: Fine.
13 MR. PRICE: Yes.
14 (The luncheon recess taken at
15 this time.)
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1 AFTERNOON SESSION

2 May 5, 1982

3
4 THE COURT: Counsel, I understand you may want
5 to go a little overtime today?

6 MR. PRICE: That might be required.

7 THE COURT: I anticipated that. Will 5:30 be
8 adequate?

9 MR. PRICE: I hope so.

10 THE COURT: I have asked the landlord to keep
11 the air on until 5:30. It gets a little sticky in here
12 if we don't do that.

13 Is that any problem with you, Mr. Veeder?

14 MR. VEEDER: No problem.

15 THE COURT: Mr. Sweeney?

16 MR. SWEENEY: No problem.

17 MR. PRICE: I appreciate you doing that.

18 I call Mr. Hampson to the stand.

19 MR. VEEDER: Your Honor, there were two exhibits,
20 while the witness is coming in, we have no objection
21 to the admittance of Walton TTTT, that's four T's,
22 and UUUU.

23 THE COURT: Four U's?

24 MR. VEEDER: Yes.

25 THE COURT: All right. Then, Exhibits TTTT and

1 UUUU -- Mr. Sweeney, was there any objection?
2 MR. SWEENEY: No, we have no objection.
3 Was PPPP entered also? That was one of the
4 maps.
5 THE CLERK: Not yet; it has not been offered.
6 MR. PRICE: We would offer PPPP.
7 THE COURT: Four P's as in Peter?
8 MR. PRICE: Yes.
9 THE COURT: Any objection from anyone?
10 MR. SWEENEY: No objection.
11 THE COURT: Mr. Veeder?
12 MR. VEEDER: No.
13 THE COURT: Do you know which one it is? That's
14 the map. It was the 1981 area being irrigated, Mr.
15 Price?
16 MR. PRICE: Yes, that's correct, Your Honor.
17 THE COURT: Is there any objection to Exhibit
18 PPPP?
19 MR. VEEDER: No. I have no objection.
20 THE COURT: It will be admitted.

1 CHARLES D. HAMPSON, called as a witness on behalf
2 of the defendant herein,
3 having been first duly sworn,
4 was examined and testified as
5 follows:
6

7 THE CLERK: Would you please state your full name
8 for the Court and spell your last?

9 THE WITNESS: Charles D. Hampson, H-A-M-P-S-O-N.
10

11 DIRECT EXAMINATION

12 BY MR. PRICE:

13 Q Good afternoon, Mr. Hampson. Would you state your
14 residence, please?

15 A Omak, Washington.

16 Q How long have you lived in Omak, Washington?

17 A Oh, within a month or two it will be 71 years.

18 Q All right. How old are you?

19 A 73.

20 Q And in the time you have lived in the Omak area, did
21 you become acquainted with what we are referring to
22 as the No Name Creek Valley, where Boyd Walton now
23 lives?

24 A Yes.

25 Q How is it that you first became acquainted with that

1 area?

2 A. Well, a neighbor by the name of Dr. Coppell leased

3 the Timentwa property along about 1920, and I started

4 going there back and forth horseback at that time.

5 Q. The Timentwa property, would that be Indian allotments

6 located south of the Boyd Walton property?

7 A. Yes, yes.

8 Q. How would you -- what means of conveyance would you

9 use to get there and back?

10 A. Well, it had to be at certain times of the year horse-

11 back or team and wagon.

12 Q. What year would that have been?

13 A. Starting about 1920.

14 Q. Were you familiar with when the Whams, a family named

15 the Whams moved onto what we refer to now as the

16 Walton property?

17 A. Just about within a year or two.

18 Q. What is your recollection of the year as best as you

19 can recall that they moved in?

20 A. I would say about '21 or '22.

21 Q. As to your own background, what is your occupation,

22 Mr. Hampson?

23 A. An apple grower.

24 Q. How many years have you been an apple grower?

25 A. All my life, but I have produced apples for 51 years.

1 Q In growing apples, do you employ irrigation practices?
2 A Yes.
3 Q Have you employed irrigation practices over that 51-
4 year period or not?
5 A All the time.
6 Q Have irrigation practices changed at all in any way
7 over that 51-year period, or have they remained the
8 same?
9 A Very substantial change.
10 Q Why don't you tell the Court in what way irrigation
11 practices have changed?
12 A Well, it was all rills when we started in 1911, up to
13 -- on my place up to 1957.
14 Q What do you mean by rills?
15 A Ditches, ditches running down, water running down hill
16 from laterals.
17 Q That would be gravity flow?
18 A Gravity, gravity, yes.
19 THE COURT: You say they were used until when?
20 THE WITNESS: On my place until 1957, when they
21 converted to sprinklers.
22 Q (By Mr. Price) I was asking you what changes occurred,
23 and you said you started out with rills, gravity flow.
24 What else was available at the time when you first
25 started irrigating? Was that the only thing available

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to you?

A. There was no sprinkler at that time.

Q. All right. When did sprinkler irrigation come into use in the Omak area?

A. On a very small scale on some sandy ground, maybe in the '30's, or '40's, but not on any large scale until the late '40's.

Q. All right. What happened in the late '40's that allowed for large scale sprinkler irrigation, if anything?

A. Portable aluminum pipe and more efficient pumps and better sprinkler heads and the necessity to get rid of rough ground.

Q. In the employment of irrigation practices that you used, did you always have electricity available to you where you were farming?

A. No.

Q. First of all, did electricity make any difference in your ability to irrigate or not to be able to irrigate?

A. Well, we were there nine years before we got electricity, and we irrigated during that time.

Q. Did electricity make any difference in the type of irrigation practices that you could employ at any given time?

1 A. Yes, it did.

2 Q. What would that be?

3 A. It made sprinkling possible or pumping from the river
4 during a drought.

5 Q. In comparing rill irrigation versus sprinkler irri-
6 gation, is there any difference in the amount of
7 water that needs to be employed by using one of the
8 methods versus the other?

9 A. Yes. The rills could take as much as 50 to 100 percent
10 more than sprinklers.

11 Q. Would that be in order to get the same amount of water
12 to the tree or to the plant or to the crop?

13 A. It would be to do an adequate job of watering the
14 trees.

15 Q. Okay. Taking you back to the No Name Creek Valley --

16 MR. PRICE: Your Honor and Counsel, we have put
17 a large picture up that is an enlargement of Defendant's
18 Exhibit U-W already admitted into evidence, and there
19 are several witnesses whom I would like to refer to the
20 larger photograph for ease of reference for the
21 Court, and I can make the admitted exhibit available
22 to Your Honor, and I have some smaller ones for
23 Counsel if we could refer to it without admitting that
24 picture into evidence.

25 THE COURT: Is there any problem with that,

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Counsel?

MR. VEEDER: No, Your Honor.

MR. SWEENEY: No, Your Honor.

THE COURT: All right. Let's proceed with that then, Mr. Price. We are referring to exhibit what number now?

MR. PRICE: I think it was handed to Your Honor.

THE COURT: Does that have a number on it? That's Exhibit U-W. We will consider the enlargement to be a duplicate of U-W.

MR. PRICE: All right. Your Honor, I am going to ask, with the indulgence of Counsel, for some clarity on the record that as the witness points to a given area on the photograph that Mr. Walton be allowed to point to the corresponding area on Exhibit T-W so there would be some semblance of order in terms of what we are talking about as to a specific location.

THE COURT: All right.

MR. PRICE: Just for demonstrative purposes only. Mr. Walton, I believe you have a pointer there beside you. I guess you don't have it beside you.

MR. VEEDER: Now, what is going to be the procedure here? Is Mr. Walton just going to point to

--

MR. WALTON: To this area on this map.

1 MR. PRICE: And he will call out the areas that
2 are identified on Exhibit T-W.

3 MR. VEEDER: And give the number; is that it?

4 MR. PRICE: Yes.

5 THE COURT: Counsel can step over here if you
6 want to check the accuracy of what Mr. Walton points
7 out, if you wish.

8 In what direction is this photo looking?

9 MR. PRICE: Apparently, southeast and basically
10 south.

11 MR. WALTON: I was standing approximately in this
12 location when I took the picture pointing this way.

13 THE COURT: All right. It is substantially
14 south.

15 MR. WALTON: Yes.

16 Q. (By Mr. Price) Mr. Hampson, I would like you to
17 point for the Court -- can you identify what you
18 believe to be the northern property line of the Walton
19 or Wham property on the photograph, please?

20 A. (Witness complies with request.)

21 Q. There appears to be a plowed strip demarking the
22 northern portion of the Walton property?

23 A. Right.

24 Q. All right. Now, when you were in that area hauling
25 wood in connection with the Coppell lease of some

1 lower allotments, how often would you be in that area?
2 A. A year going to Omak, going to the Coppel place?
3 Q. Yes. Is that one trip a year or --
4 A. No, no. It could have been from a half a dozen to
5 ten or eleven.
6 Q. All right. Did you continue to be in that area in
7 the No Name Creek Valley for a number of years?
8 A. Some, yes.
9 Q. Have you been familiar with the area up to the present
10 day?
11 A. Yes.
12 Q. In terms of the photograph that you are looking at
13 there and pointing to, does that depict the state
14 of the property as you recall it back in 1921, or
15 were there some differences?
16 A. Well, the road has been changed substantially since
17 then. This field right here was in alfalfa.
18 Q. Excuse me now. You are pointing to --
19 MR. WALTON: 10-A.
20 MR. PRICE: On Exhibit T-W. All right.
21 MR. VEEDER: May I have a time frame on this?
22 THE COURT: What is the designation of it? Is
23 it 10-A?
24 MR. WALTON: Right.
25 THE COURT: All right. Mr. Walton, or Mr. Veeder

1 would like the time established that we are talking
2 about.

3 Q (By Mr. Price) Mr. Hampson, what time period are we
4 talking about?

5 A It was in alfalfa the first time we went to Omak Lake,
6 and I can't pin it down to the actual year without
7 knowing the year that Dr. Coppel leased that property.

8 Q But, you believe to the best of your recollection it
9 was in --

10 A '20 or '21.

11 MR. VEEDER: 1920 or 1921?

12 THE WITNESS: Right.

13 Q (By Mr. Price) Okay. Would you continue then. What
14 else did you observe about the property, if anything,
15 at that time?

16 A Well, this over here east of the creek here, that
17 appeared to be in alfalfa, although I wasn't over
18 there, but this area right in here --

19 Q Excuse me, Mr. Hampson. The area that you just pointed
20 to that you thought was in alfalfa, Mr. Walton --

21 MR. WALTON: That's called 15-A.

22 MR. PRICE: On Exhibit T-W.

23 MR. VEEDER: I am going to have to object to
24 that if the witness doesn't know what was raised
25 there and he thought it was alfalfa, I will have to

1 interpose an objection to it.

2 THE COURT: Well, I understand his testimony was
3 that he wasn't sure, but from his observations he
4 thought it was alfalfa.

5 Q. (By Mr. Price) Let me ask you this, Mr. Hampson:
6 Was the area green or brown?

7 A. It was green, and I can recognize alfalfa.

8 Q. All right. Would you continue with what else you
9 observed there at that time?

10 A. The road cut right down through the middle of this
11 piece right here, and there was corn in there on that.

12 Q. All right.

13 MR. WALTON: I have marked that 7-A, the northern
14 end of 7-A.

15 MR. PRICE: On Exhibit T-W.

16 Q. (By Mr. Price) All right. Did you observe any other
17 things about the property in terms of whether it
18 appeared to be cultivated or not?

19 A. Well, I saw Donald Wham with a team with hay on it
20 going down the road.

21 MR. VEEDER: I object to the answer, Your Honor.
22 It's not responsive.

23 THE WITNESS: And they mowed hay. There were
24 hay shocks out there along both sides of the creek.

25 Q. (By Mr. Price) Would you point to the area where you

1 recall seeing hay shocks?

2 A. Well, that was down in this area here and on down
3 to there.

4 MR. WALTON: It would be 20-A, adjacent to 3-A,
5 and lower than 1-A, south of 1-A.

6 Q. (By Mr. Price) In terms of the upper field starting
7 at the first field you have pointed to, do you have an
8 opinion as to approximately how many acres would have
9 been -- were under cultivation at that point?

10 A. I estimated that from seven to ten.

11 Q. All right. Proceeding to the next field below the
12 house that you believed to be alfalfa, approximately
13 how many acres in your opinion was under irrigation
14 there?

15 A. I would say about seven.

16 Q. All right. The area that you have designated where
17 corn was growing. Approximately how many acres?

18 A. I would say about three acres there.

19 Q. In terms of the hay shocks in the fields that evi-
20 denced hay, approximately how many acres were
21 involved there?

22 A. I would say from 40 to 50.

23 Q. Were you familiar with what methods were being
24 employed on that property to achieve irrigation?

25 A. They were pumping onto this piece with a small gasoline

1 engine.

2 Q You are pointing to 10-A?

3 A I didn't see it, but I could hear it as we rode down
4 this road here, and there was water in a pipeline
5 across here, and it ran south there in ditches.

6 Q This was all in Field 10-A?

7 MR. WALTON: This is Field 10-A.

8 Q (By Mr. Price) All right. Did you observe what
9 methods were being utilized to irrigate any of the
10 other areas?

11 A No, I didn't.

12 Q All right. Do you know whether or not the southern
13 area you indicate where hay was being cultivated as
14 to whether or not that was subirrigated or irrigated
15 in some other fashion?

16 A Well, it was subirrigated, and it probably had to
17 be --

18 MR. VEEDER: I didn't hear that. Just a moment,
19 please.

20 THE COURT: Just a moment, sir. We have an
21 objection.

22 MR. VEEDER: He said, "It had to be." I'm
23 interested in --

24 THE COURT: Yes. I think that is a proper objec-
25 tion.

1 THE WITNESS: A flood, a flood, I think.

2 MR. VEEDER: You said it had to be flood? Is
3 that it? I want to know what the record says. Does
4 he say --

5 THE COURT: What were you going to describe about
6 that?

7 THE WITNESS: He asked me how it was irrigated,
8 and I said --

9 THE COURT: You said it had to be by flood
10 irrigation.

11 THE WITNESS: Well, I said by -- possibly be
12 flood through part of the growing season.

13 THE COURT: Well, the real question -- do you have
14 an objection, Mr. Veeder?

15 MR. VEEDER: Yes, I do have an objection, Your
16 Honor.

17 THE COURT: Do you have a way of being accurate
18 in any manner as to how you would know how it was done?

19 THE WITNESS: Well, just from native intelligence
20 from the heighth of the grass.

21 THE COURT: That there was water there from some
22 source?

23 THE WITNESS: Had to be.

24 THE COURT: But, you don't know how it got there;
25 is that what you are saying?

1 THE WITNESS: It got there by gravity.

2 THE COURT: All right. Where does that leave us?

3 MR. PRICE: That water seeks its own level, I
4 guess.

5 Q. (By Mr. Price) Mr. Hampson, as an irrigator and farmer
6 for some 50 years, and being knowledgeable about irri-
7 gation practices in the Okanogan area, would you have
8 an opinion as to whether or not the Wham property was
9 being diligently irrigated and cultivated during the
10 period of the 1920's, through the 1940's?

11 MR. VEEDER: I object to that, Your Honor. That
12 calls for a legal conclusion, a legal conclusion as
13 to whether it is reasonable diligence or not.

14 THE COURT: I think that is really the question
15 that the Court is going to have to decide. I think
16 you can cover his knowledge about the scope of irriga-
17 tion, and you may want to develop that, Mr. Price,
18 but as far as the ultimate question I think Mr. Veeder
19 is correct. There are so many factors going into that
20 issue that I have to resolve that.

21 MR. PRICE: Your Honor, I recognize that that
22 treads on the legal consideration, but I am not so
23 sure that we are going to be able to separate the two
24 in terms of the fact that reasonable diligence is
25 maybe a legal term. It is still a common sense term,

1 and we are asking the witness --

2 THE COURT: Perhaps you could address it this
3 way: If Mr. Hampson qualifies as an expert,
4 obviously an expert under the rule can testify as to
5 the ultimate fact in the case. Perhaps you might
6 develop with Mr. Hampson considering the -- hypo-
7 thetically or otherwise -- on the various elements
8 that go into the question of due diligence, and perhaps
9 you can develop your theory that way.

10 Q. (By Mr. Price) Mr. Hampson, in terms of the decision
11 of whether or not to irrigate a particular tract of
12 land, is that decision made considering a number of
13 factors, or just one factor, or how do you determine
14 as a farmer whether or not you can or should put a
15 particular piece of ground under irrigation?

16 A. Well, it is the lay of the land, the number of -- the
17 quality of it, the water-holding capacity, the number
18 of rocks in it, how steep it is.

19 Q. Does the availability of the water source have any-
20 thing to do with it?

21 A. Oh, yes, yes. Sure. That's number one.

22 Q. Does the state of the art of technology in terms of
23 irrigation equipment have anything to do with it?

24 MR. VEEDER: I object to the question, Your
25 Honor. This is going far afield into the area of the

1 purest kind of speculation and conjecture as to what
2 the Whams may have done or might have thought of in
3 the early 1920's. I don't believe this witness is
4 qualified. I don't believe anyone is qualified to
5 ascertain or make a determination as to what the
6 intent of the Whams were during that period.

7 THE COURT: Well, I don't think he was asked
8 to testify as to what their intent was. I think it
9 is obvious to me that if you have to raise water up
10 to a place to irrigate a piece of land, you have to
11 have a means of getting it up there.

12 MR. VEEDER: But, the inquiry, if I may suggest,
13 is to the effect that we are going still back to the
14 point of due diligence and Your Honor sustained the
15 objection on that line. Now, we are saying we are
16 coming along and he is saying why or why did they
17 not do something, and I think there are 100 factors,
18 maybe 1,000 factors that come into a determination as
19 to whether the Whams would irrigate the lower part of
20 the area or not.

21 THE COURT: Well, what the Whams' intentions
22 may have been or not have been, I think you people
23 here, the litigants, are in a position where this
24 Court is being asked to determine rights of these
25 parties which are inextricably tied to the history

1 of this land, and the fact that many people are not
2 available, and I simply have to hear what evidence
3 seems to bear on this question in order to properly
4 evaluate it.

5 I am going to permit the testimony as to
6 what considerations and experiences a reasonable
7 person, knowledgeable about the crops and irrigation,
8 would or would not have done depending upon what
9 circumstances he wishes to testify to. I don't
10 think necessarily it indicates what the intention of
11 the parties were. What bearing it has there, I will
12 have to figure out later, but I can't possibly decide
13 this case without having some of the history and some
14 of the knowledge and such of people that were familiar
15 with it.

16 I am going to permit this in line with my
17 comments this morning that I have to allow some lati-
18 tude here, and I am saying this for both sides, and
19 then what is or is not proper evidence, I have the
20 obligation not to consider it if it is improper, and
21 if it is not probative, and to consider only evidence
22 which is relevant and proper, but I can't try this
23 case in a vacuum, and so I am going to overrule the
24 objection and permit Mr. Hampson to answer.

25 Now, if we can find the question after all

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of that --

MR. PRICE: I am one of those who forgets the question easily, and Your Honor, I must take exception to Counsel trying to rephrase a question. I did not ask this witness anything about the Whams' intent. I was going into what he considered the elements relevant to putting ground to irrigation, and to try and develop whether they are or are not reasonable is something that this Court will have to determine, but if Counsel --

MR. VEEDER: My objection is that the question is irrelevant.

MR. PRICE: Counsel tends to rephrase my question and then objects to a question he posed and not me. We are going to be here a long time.

THE COURT: Well, we will control that, but you go ahead and develop that testimony along those lines.

MR. PRICE: Thank you.

MR. VEEDER: Are we through with the locations?

MR. PRICE: With this witness, I believe so, at this point.

Q (By Mr. Price) Mr. Hampson, as Counsel so appropriately pointed out, there may be 100 or a thousand considerations that go into whether a particular piece is irrigable at a given point in time; is that correct?

1 A. (Witness nods.)
2 Q. And do or do not economic considerations play a part
3 in whether land is put into irrigation?
4 A. It has, yes.
5 Q. If I told you and asked you to assume that you were
6 to put a piece of ground under irrigation, that portion
7 of the ground that could practicably, quote, "prac-
8 ticably" be irrigated, what considerations would you
9 have to take in determining whether you should irri-
10 gate that land or not, or are they the things that we
11 have just covered?
12 A. Would you go through that again, please?
13 Q. I guess what I am trying to get is just because land
14 is there, does that mean you can put water to it and
15 farm it?
16 A. No.
17 Q. In other words, there has to be -- do there or do
18 there not have to be some practicable considerations
19 as to whether you irrigate at any given time?
20 A. Yes, yes, certain elements that I mentioned.
21 Q. I am asking you with your opinion and knowledge of
22 irrigating practices in the Okanogan area, do you
23 have an opinion as to whether the irrigation practices
24 employed on the Wham property were reasonable?
25 A. Yes, I do.

1 MR. VEEDER: I am going to object. He is calling
2 for an opinion of the evidence, and I don't think
3 this witness has been qualified to testify as an
4 expert in regard to this particular piece of property.
5 I don't think he is qualified.

6 THE COURT: Well, Mr. Hampson's testimony indi-
7 cates that he has been involved in irrigating in one
8 form or another for something like 50 years, and that
9 he was through this valley as many as six to ten times
10 a year for obviously many years. Is that correct,
11 sir?

12 THE WITNESS: Right.

13 THE COURT: I think your objection may go more
14 to the weight. I think he can give us his opinion
15 as to whether, considering all of the circumstances,
16 the conduct of the property owners in irrigating,
17 was reasonable in his opinion, but what weight will
18 be given to it is another question, but I will permit
19 him to answer.

20 THE WITNESS: The end result would indicate they
21 were very diligent because they made two blades of
22 grass grow where one grew before.

23 Q. (By Mr. Price) Are you familiar with when power was
24 made available to the Walton property, the Wham
25 property?

1 A. Approximately.

2 Q. And when was that, to your knowledge?

3 A. I didn't see it installed. I have heard that it was
4 '48 or '49.

5 MR. VEEDER: I object. This is hearsay. This
6 is totally hearsay, Your Honor.

7 THE COURT: Was there any question about when it
8 was done? The people that put it in said it was 1949,
9 as I recall.

10 MR. VEEDER: That is cumulative. I don't know
11 what the witness is being asked the question for, then.

12 THE COURT: Well, can we assume, can Counsel
13 assume that the power came to the area in 1949? Is
14 there any question about that? Does anyone dispute
15 it?

16 MR. SWEENEY: To the Walton property, yes. We
17 have no dispute with that.

18 MR. VEEDER: What we say on that point, though,
19 and I renew my objections, is that it has nothing to
20 do with due diligence, Your Honor.

21 THE COURT: Well, I understand that, but the
22 question is when power came on the land, and if there
23 is no question about it, why are we arguing about it?

24 MR. VEEDER: That's why I was wondering why the
25 question was asked.

1 THE COURT: Well, in any event, I gather that all
2 Counsel can agree that power came to the Walton
3 property in 1949. Is there any question about that?

4 MR. VEEDER: I have none.

5 MR. SWEENEY: No.

6 THE COURT: Then, you can assume that, Mr.
7 Hampson, and you won't have to guess about it.

8 THE WITNESS: Well, I went to the lake every
9 year, and I did see the power poles.

10 Q (By Mr. Price) Mr. Hampson, would the bringing of
11 power to the property in '49, lend different considera-
12 tions as to what might be put to irrigation as before
13 that time?

14 A. Very definitely.

15 Q Would the advent of aluminum pipe being made available
16 in the Okanogan area in the late '40's make a
17 difference in the determination of what land might be
18 practicably be put to irrigation after that time?

19 A. Yes.

20 Q Does the type of power made available have any impact
21 on irrigation practices? For instance, does it make
22 any difference whether the power is one phase or three
23 phase or two phase or something else?

24 A. I am not qualified to answer that except by hearsay.

25 Q All right.

1 A. I have a 10 horse motor. I think it is three phase.

2 Q Mr. Hampson, are you familiar with whether or not
3 there were any treed or woods areas on the Wham
4 property when you first recall seeing that property?

5 A. Yes, it had been logged some for deciduous and also
6 pine.

7 Q Do you know who logged?

8 A. Well, Mannely Wham hauled wood to our place in the
9 '20's, and later there was some brothers by the
10 name of Lane that logged it for pine after the Whams
11 had left it.

12 Q All right. Are those areas that were logged -- have
13 they now been put to irrigation, or do you know?

14 A. For the deciduous trees, they have been.

15 Q Can you depict, point to the photograph as to where
16 you recall wooded areas that may have been cleared?

17 A. Well, it went clear down to the end there, and it
18 used to be quite a woods area clear down to the lower
19 south end down here and along through this area in
20 here.

21 MR. WALTON: Just hold on a second. You pointed
22 to that south end again.

23 THE WITNESS: Way down there. That was woods.
24 There was birch and some other varieties.

25 MR. WALTON: South of the field marked 6-A on

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T-W.

THE WITNESS: And also, there was birch all along the creek which has been removed. This was 60 some years ago. There was a lot of birch all along the creek.

MR. WALTON: That would be in the Field 20-A.

THE WITNESS: Clear up in here and over in this area is all along the creek.

MR. VEEDER: Now, I would like to have him point to where he said, "all along this area," and have it identified as to what he testified and the last part of his statement if we are going to point out things. He pointed to an area that is now in the field, and that would be --

MR. PRICE: Well, Counsel, why don't we just have him identify it like you suggested rather than you testifying again?

Q. (By Mr. Price) Mr. Hampson, would you point to the last portion where you said the last point you had your pointer to the north portion of the property indicating there were trees?

A. Well, there was woods, soft woods clear up here to the road right along here at that time.

MR. WALTON: West of 12-A.

THE WITNESS: Right up here, and then this came

1 along -- extended along the creek and all the way
2 from the creek clear down to the lake.

3 MR. WALTON: Between Field 10-A and 12-A, and
4 between Field 7-A and 15-A.

5 Q (By Mr. Price) And is the area that would have con-
6 tained these trees, is that now depicted as cultivated
7 land in that picture?

8 A. Well, it's been raising grass.

9 Q All right.

10 THE COURT: How was the logging done there in
11 those days, Mr. Hampson?

12 THE WITNESS: It was done the way Abraham Lincoln
13 did it, you done the soft woods and then by the time
14 they get into the pine, it was by logging truck and a
15 team to get them out of the woods and chain saw.
16 That was along in the '40's sometime.

17 MR. PRICE: I know Mr. Veeder is going to ask you
18 -- you didn't know Abraham Lincoln personally, did
19 you?

20 THE WITNESS: I heard a lot about him. Both my
21 grandfathers was in the Civil War from the North.

22 Q (By Mr. Price) Is there any difference in terms of the
23 labor required in rill irrigation versus sprinkler
24 irrigation?

25 A. Yes, very substantially.

1 Q And would you tell the Court in what way, please?

2 A It's very time consuming to make the rills, and then
3 you have to clean them out a couple times a year, and
4 as far as actually changing the water, going out and
5 changing it with a shovel, it isn't a great deal of
6 difference than changing pipelines, maybe not quite
7 as much sometimes.

8 Q Let me ask you this question: Looking at the photo-
9 graph there that's depicted on, drawn on Exhibit T-W,
10 would it have been feasible for Mr. Wham to have
11 rill irrigated 106 acres of that land or the land
12 that's depicted in that picture?

13 MR. VEEDER: I object to the question. It is
14 the purest kind of conjecture. I don't know how
15 he can make an ascertainment of what Mr. Wham could
16 have done on 105 acres. There is no basis for it at
17 all.

18 THE COURT: Your objection is -- I didn't quite
19 get the grounds for it, Mr. Veeder.

20 MR. VEEDER: The grounds?

21 THE COURT: Yes.

22 MR. VEEDER: There is no basis whatsoever for
23 this witness -- there is no foundation for such a
24 response to that question. It would have to be an
25 expert question -- it should be a question to an

1 expert and an answer by an expert in regard to
2 irrigating a large tract of land that's obviously
3 boggy as can be seen from the photograph. There are
4 a great many questions that are involved in this, and
5 I think he has got to have a foundation to ask the
6 question.

7 THE COURT: All right. Well, maybe you should
8 rephrase the question, Counsel. I think it was kind
9 of general, but take another crack at it.

10 MR. PRICE: Thank you, Your Honor.

11 Q. (By Mr. Price) Mr. Hampson, on the photograph of the
12 Walton property it depicts a substantial amount of
13 cultivated land. Is that not correct?

14 A. Yes.

15 Q. Could one man physically rill irrigate that property?
16 Would it be practicable for such a person to do that?

17 MR. VEEDER: I object. The question is totally
18 irrelevant in regard to the question of due diligence.
19 As we said before, the rule that is controlling here
20 is not whether there is one man or five or the man
21 is sick, whether the man is financially able. The
22 whole question is what kind of a project does he plan,
23 and can he go ahead and develop it with reasonable
24 diligence, and whether he has to have an army or not
25 is beside the point.

1 THE COURT: Well, I am going to hear the testi-
2 mony. I will overrule the objection.

3 THE WITNESS: My father irrigated 80 to 100
4 acres starting in 1911, with rills.

5 Q. (By Mr. Price) Rills, all right. What kind of
6 ground was that?

7 A. Some of it was very sandy, and some of it was very
8 rocky.

9 Q. Did he employ any help in doing that?

10 A. Well, some of us boys went to the lower end of the
11 ditch and told him whether it was through or not and
12 saved him a lot of steps, and then his whistle saved
13 him a good, many, weary steps.

14 Q. How many acres could you irrigate at a given point in
15 time?

16 A. In one day?

17 Q. Well, say one day. Could you irrigate all 100 or 80
18 acres in one day?

19 A. Well, you could do 40 or 50 a day.

20 Q. What was your source of water for that?

21 A. It came from Conconully from an Okanogan Irrigation
22 District.

23 Q. You were under an irrigation system at that point?

24 A. Yes.

25 Q. Are you familiar with pumps in terms of their capacity

1 to lift water and in terms of a gas powered five horse-
2 powered pump? Would you have an opinion or have
3 knowledge as to that?
4 A. Five horsepower gas?
5 Q. Yes.
6 A. That would be very low capacity, maybe 50 gallons a
7 minute.
8 Q. All right. Is that called a low head?
9 A. Well, they were pumping from wells to the surface.
10 Q. Okay.
11 A. Maybe 30 feet or so in those days.
12 Q. Do you know if that was about the maximum that that
13 could pump in terms of lift?
14 A. Some of them went higher than that; some of the wells
15 were deeper, and the lakes that they got to pumping
16 out of, the lift was more than that.
17 Q. With a five horsepower pump?
18 A. I don't know the horsepower, but some of them.
19 Q. All right. Are you familiar with whether or not
20 there was a flood in the No Name Creek Valley in
21 1948?
22 A. Omak Creek tore out all the bridges. The flood tore
23 out all the railroad bridges on Omak Creek in '48.
24 Q. Do you know whether or not that water from Omak
25 Creek came down through part of the --

1 A. I heard that it did.

2 MR. VEEDER: I object to the answer. That's pure
3 hearsay.

4 THE COURT: Yes. I think it is hearsay. Go
5 ahead. 1948 was a big flood year throughout the
6 Northwest?

7 THE WITNESS: That was a year there was high
8 water.

9 THE COURT: Everywhere, yes.

10 THE WITNESS: Not quite as high as '94.

11 THE COURT: I don't remember '94.

12 THE WITNESS: Not quite as high as '72, but it
13 put Omak under water.

14 THE COURT: The town?

15 THE WITNESS: A good deal of it over where our
16 Indian friends live.

17 Q. (By Mr. Price) Mr. Hampson, what was the state of
18 the economy in the Omak-Okanogan area in the 1930's?

19 A. That was the worst time the apple business ever saw.

20 Q. Just the apple business or anybody else, or do you
21 know?

22 A. Well, there was only one year in the '30's that I sold
23 any apples for as much as a dollar.

24 Q. What were the precipitation conditions during the
25 '30's?

1 A. They were good after 1931. It did start to rain then.

2 Q. It started. The economy was bad, but the rain was
3 good?

4 A. Well, they said it was Hoover, but I think it was
5 Roosevelt.

6 THE COURT: I think we probably ought to avoid
7 political confrontations here, if we can.

8 Q. (By Mr. Price) Did the economy improve after the
9 '30's?

10 A. When Hitler came along, it did.

11 Q. The war did improve the economy?

12 A. Things picked up then.

13 Q. After the war in the Okanogan Valley, was the economy
14 good, bad, or indifferent?

15 A. It's been good.

16 Q. Do you have an opinion as to when the greatest amount
17 of agricultural development occurred in the Okanogan-
18 Omak area?

19 MR. VEEDER: I have to object to this, Your
20 Honor.

21 THE WITNESS: It developed along the --

22 THE COURT: Hold on a second.

23 MR. VEEDER: I don't see why we have to ask
24 this gentleman for an opinion. I don't think that
25 he is qualified to make a determination as to the

1 economics of the area.

2 I hate to object to these things, but it is
3 simply, totally irrelevant for this man to undertake
4 to make an assessment of the economic situation.

5 THE COURT: Well, I don't think I need any
6 testimony to evaluate what the economic situation was
7 anywhere in the 1930's in this country.

8 MR. PRICE: Your Honor, I am now asking him for
9 agricultural development.

10 THE COURT: That was my understanding. My next
11 comment was the question was when did the substantial
12 agricultural development get going in the Omak Valley
13 or the Omak area.

14 MR. PRICE: That's correct, Your Honor.

15 THE COURT: I think that's a proper question.

16 THE WITNESS: The big expansion and planning was
17 about 1909, '10, '11, and '12. The project in
18 Conconully was completed about 1909 or '10, and then
19 the whole thing was based on a big export market to
20 Europe at that time.

21 Q (By Mr. Price) You are now talking about apple
22 agricultural development?

23 A Right.

24 Q In conjunction with the Okanogan Irrigation District,
25 the Federal Irrigation Project?

1 A. Yes.

2 Q. All right. Was there any period of time after the
3 introduction of the irrigation system on the west
4 side of the river -- well, maybe I should develop
5 that.

6 The system you are talking about is to the
7 west of the Okanogan River, and the Walton property
8 is up in some highland country to the east of the
9 Okanogan country.

10 A. Yes.

11 Q. The irrigation system was not available to the
12 Walton property; is that true?

13 A. No, no, it was miles from there.

14 Q. Okay. Apart from the advent of the irrigation
15 district, was there any other period of time in which
16 you are aware of a spurt, if there was one, in agri-
17 cultural development in the Okanogan area?

18 A. Yes. After aluminum pipe came in, there was quite an
19 expansion of irrigation.

20 Q. When would that have been?

21 A. About -- it started with '46, '-7, or '-8.

22 Q. Would have been after World War II, the end of World
23 War II?

24 A. Yes.

25 MR. PRICE: I believe that's all the questions I

1 have right now. Thank you, Mr. Hampson.

2 THE COURT: Mr. Sweeney, are you up next?

3

4

CROSS-EXAMINATION

5

BY MR. SWEENEY:

6

Q. Mr. Hampson, you first saw this area about where Mr. Walton's ranch is now, about 1920; is that correct?

7

8

A. Within a year or two.

9

Q. And that's when you went to visit Dr. Coppell's?

10

A. No, I didn't go to visit him. I visited the place he had rented out there.

11

12

Q. I see. It was land on the Indian Reservation that Dr. Coppell leased?

13

14

A. Yes.

15

Q. Do you know the dates of that lease or --

16

A. It ran for about three years, I think, in those days. I think it did.

17

18

Q. Okay. Now, where was that land that Dr. Coppell leased in relation to what's now the Walton Ranch?

19

20

A. It joins them on the south.

21

Q. Towards Omak Lake; is that correct?

22

A. Yes.

23

Q. Was that land being cultivated --

24

A. Yes.

25

Q. -- at the time that Dr. Coppell had it leased?

1 A. That's what he took it for -- to raise hay on.
2 Q. How was that land irrigated?
3 A. Out of the creek.
4 Q. Out of No Name Creek?
5 A. Yes.
6 Q. Okay. Does any of that land appear on the photographs
7 on the easel?
8 A. No, no. It is below the trajectory there. You can
9 see the north end of the lake, but you can't see
10 any of the property, so it would be way back in
11 here and maybe a little bit way back there, but what
12 Coppell was interested in was down under those rocks
13 there.
14 Q. And he leased it and also irrigated that land; is
15 that correct --
16 A. Yes.
17 Q. -- to grow hay?
18 A. Right.
19 Q. Your relationship was to go visit the property and
20 do some work there?
21 A. No. I visited it, but it was to do some work.
22 Q. What type of work did you do?
23 A. Taking horses and cattle back and forth from Omak to
24 Omak Lake.
25 Q. I see. Then, they would graze on --

1 A. They were there for pasture.

2 Q I see. You would make about six to twelve trips a
3 year?

4 A. Depending on how many people had horses out there for
5 commercial lease and so on. I would go and take
6 them out and bring them back when they wanted them
7 and so on.

8 Q I see. It was during these trips for about three
9 years that you had occasion to observe what is now
10 the Walton Ranch?

11 A. Yes.

12 MR. PRICE: Excuse me. I object to the form
13 of the question. He said for about three years. I
14 believe Mr. Hampson's testimony covered quite a quite
15 broader range than that, and it was not limited to
16 three years irrespective of when he was hauling
17 horses. I believe his testimony was that he was out
18 there off and on up to the present time.

19 THE COURT: Maybe we ought to clear that up.

20 Q (By Mr. Sweeney) Mr. Hampson, Dr. Coppell's lease was
21 for about three years?

22 A. Right.

23 Q And you made these six to twelve trips a year during
24 that period of the lease?

25 A. Again, for the few years after that, it reverted to

1 Paul Timentwa.
2 Q Timentwa?
3 A Timentwa.
4 Q Well, I will accept your pronunciation, so you con-
5 tinued your trips when Mr. Timentwa had that?
6 A Right.
7 Q For how long was that?
8 A Three or four years.
9 Q So, would that be a total of six or seven years
10 between Dr. Coppel and Mr. Timentwa?
11 A Right.
12 Q This is in the '40's?
13 A Right.
14 Q Now, in your testimony you said that on the northerly
15 portion of what is now the Walton property there were
16 seven to ten acres that were irrigated.
17 A Yes.
18 Q Okay. There was about another -- well, first of all,
19 on the seven to ten acres, is that by the northerly
20 boundary of the Walton property?
21 A Yes.
22 Q What crop was in there at the time?
23 A Alfalfa.
24 Q How was that irrigated?
25 A Well, I could give you a simple answer which would be

1 by water, but it was running down ditches.

2 Q Where did the water come from?

3 A I think it came out of a creek.

4 Q No Name Creek?

5 A I heard a machine over there. I suppose it was on a

6 creek.

7 Q Now, that's where you said pumping with a small gas

8 engine?

9 A Right.

10 Q That's the machine that you heard?

11 A That's what I thought I heard.

12 Q You assumed it was pumping out water out of No Name

13 Creek?

14 A The water was running down ditches there down along

15 the road.

16 Q You recognize the sound of a small gas engine?

17 A Right.

18 Q You had heard that sound before?

19 A I have, dozens of them.

20 Q Well, how would it be that you have heard that sound

21 before, dozens of them before?

22 A Because people were pumping out of wells in the

23 proximity of Omak with one cylinder engines.

24 Q Were they also pumping surface water out of streams?

25 A Some of them were.

1 Q. Was that a common way of irrigating and of obtaining
2 water to irrigate?
3 A. It was a desperation move after the gravity water
4 dried up.
5 Q. But, it was commonplace for that to be done; isn't
6 that correct?
7 A. There was a lot of them doing it.
8 Q. Now, you said there was a field below the house of
9 about seven acres; is that correct?
10 A. Yes.
11 Q. And would you point that out again, please, if you
12 could?
13 A. (Witness complies with request.)
14 Q. Thank you. Was that also alfalfa?
15 A. It looked like it to me.
16 Q. How was the water brought to that parcel?
17 A. I didn't hear any motor. I'm not saying that it
18 wasn't got there by a motor, but --
19 Q. You really don't know then; is that correct?
20 A. No, I don't.
21 Q. Okay. Then, you said there was a field of corn of
22 about three acres?
23 A. Yes, I did.
24 Q. How was the water brought to that field?
25 A. That was by the Lord supplying the water to it.

1 Q Well, is that sort of like the water was naturally
2 enough to grow the crop; it was subirrigated?
3 A Yes.
4 Q Now, you testified in the first trial, did you not?
5 A I was here.
6 Q Didn't you testify?
7 A I answered some questions.
8 Q Well, that's what I meant. Are you aware of the
9 different allotment numbers that we refer to that
10 involve the Walton property?
11 A No. I have not memorized those numbers. I know them
12 by name.
13 Q We refer, at least I refer, to northernmost allotment
14 of Mr. Walton's property is 525. Do you know that?
15 A I knew the Smitaken Brothers, but I didn't know the
16 numbers.
17 Q Well, do you recall testifying in the first trial
18 that there were seven or nine or ten acres on Allotment
19 525 when you saw it during the 1920's?
20 A Now, you mean extreme north end?
21 Q Yes.
22 A That's what I said.
23 Q Okay. Do you recall testifying that as far as you
24 could recall, there was no irrigation of land lying
25 to the south, the southerly portion of Mr. Walton's

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property?

A. There was no -- no water being applied by rills or sprinklers.

Q. Was it the subirrigation that you are referring to?

A. Yes.

Q. Okay. So, it was without the intervention of man is --

A. Could have been by man.

Q. But, you don't know that?

A. If they flood irrigated.

Q. But, you don't know how it was. You said it was natural irrigation, I think.

A. Yes, I said that.

Q. You said that in the first trial, did you not?

A. Yes, I did.

MR. PRICE: I am going to object to Counsel's remark that it was without man's intervention, Your Honor. It has been testified to at this point that there was cultivation of that property. That is man's intervention in terms of the use of the water. I object.

THE COURT: Well, I think Mr. Hampson said he didn't know whether it was man's intervention or not, that he did not view any artificial irrigation conditions. Is that correct, sir? You didn't view any?

MR. VEEDER: Your Honor, I can't hear what you

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said.

THE COURT: Well, I was merely trying to respond to Mr. Price's comments. The problem is if we are going to use previous testimony maybe we ought to use the actual testimony so we can put this thing in context.

MR. SWEENEY: I will, Your Honor.

MR. PRICE: Without taking issue of what he is saying about man-made diversions or such, I am taking exception to his framing it in the context that sub-irrigation is not somehow a utilization of water. I want to make sure we don't get lost in it because we intend to argue that subirrigation, if utilized, is a utilization of the water.

MR. SWEENEY: May I approach the witness?

THE COURT: Yes.

MR. SWEENEY: I will ask him to look at the --

Q. (By Mr. Sweeney) Mr. Hampson, I am directing your attention to Page 2079. Do you have that before you?

A. I see it right there.

Q. Now, starting at line 4, I will just read the question.

A. Okay.

Q. (Reading) "Well, not deliberate irrigation." Line 2, "In 1921, was there any irrigation in that section of Mr. Walton's property, or did that --" Then, your

1 answer. Would you read that, please?

2 A. (Reading) "Well, not deliberate irrigation. There

3 was irrigation by subirrigation."

4 Q. "And what do you mean by subirrigation?"

5 A. Do you want me to read that?

6 Q. Yes.

7 A. "Water reaching out laterally from the stream."

8 Q. "Is that naturally?" And you answered --

9 A. "Yes."

10 Q. "And so there was no --" Then, you went ahead and

11 said --

12 A. "Yes."

13 Q. Excuse me. Go ahead.

14 A. "The piece of ground is so flat that there is such

15 little fall that that area would be wet."

16 Q. "But, there was no man-made applications?"

17 A. "Not that I know of."

18 Q. Okay. You were asked whether you were familiar on

19 Page 2080 with the southern portion of Mr. Walton's

20 property, and you answered that you were. Is that

21 correct?

22 A. Yes.

23 Q. Then, you were asked, "Could you tell me, based on

24 your recollection, whether in the southern portion

25 of Mr. Walton's property there was any irrigation in

1 1923?" Your answer was what?

2 A. "No."

3 Q. Now, getting back to this gas engine that you heard.

4 As I understand it, you were familiar with that sound

5 because you were aware or had seen gas engines being

6 used for the lifting of water out of wells and out of

7 streams for irrigation purposes. Is that correct?

8 A. Yes.

9 Q. At that time, as I understand it, rill irrigation or

10 gravity irrigation was commonplace in the area;

11 is that correct?

12 A. Yes.

13 Q. It was commonplace throughout the Okanogan area?

14 A. Yes.

15 Q. That would apply to apple orchards?

16 A. Yes.

17 Q. How about alfalfa or pasture?

18 A. That was rills.

19 Q. Also rills.

20 A. Well, some of it. Some along certain low places was

21 flooded.

22 Q. I see. You said that your father irrigated 80 to

23 100 acres of rill irrigated property; is that right?

24 A. Yes, I did.

25 Q. Okay, and that you could irrigate probably or approxi-

1 mately 40 to 50 acres a day with the rill method?

2 A. Yes.

3 Q. Now, for about three years with Dr. Coppel, and then
4 another three or four years thereafter, you were
5 making these trips down from Omak down to Omak Lake
6 and the area adjacent to Omak Lake; is that correct?

7 A. By horseback.

8 Q. How many acres were being irrigated down there?

9 A. Well, it was -- that was a flooded deal, too, most
10 of it was, and it could have been about 20 to 25 --
11 possibly even 30 acres, although some of it would
12 have shown of grass, and some of that was subirrigated.

13 Q. So you said 20 or 30 acres; is that correct?

14 A. Yes.

15 MR. VEEDER: Now, Your Honor, I am going to
16 object to this because Counsel is getting the witness
17 to change his testimony from what it was in the
18 original instance.

19 THE COURT: Well, he just testified 25 to 30 acres,
20 I thought.

21 MR. VEEDER: In the record, I thought he testified
22 30 to 40 acres. Now, there is a difference. Now, if
23 we are going to -- may I just interpose this objec-
24 tion?

25 So far as I'm concerned, we are standing on

1 the record as it is. Your Order said that we were
2 going to bring in additional data, not cumulative,
3 and that would be the extent of the testimony. Now,
4 if we are going into changed testimony, I think this
5 is a very serious undertaking here.

6 THE COURT: Well, I have nothing to indicate
7 that there was any changed testimony.

8 MR. VEEDER: Well, this is a change of testimony,
9 Your Honor.

10 THE COURT: Based on what?

11 MR. SWEENEY: Where is it 30 to 40?

12 MR. VEEDER: It's in here.

13 MR. SWEENEY: What page?

14 Well, I'll get on, if I may, Your Honor.
15 I am not trying to change any testimony and I will
16 stand with whatever is in the record with Mr. Hampson
17 as far as that's concerned.

18 MR. VEEDER: Well, the best thing is to leave
19 it alone.

20 THE COURT: Let's not get involved in colloquy.
21 I have nothing to rule on. I think we could move
22 along a little faster if we take his testimony, and
23 then if you want to argue about what he said before,
24 fine. Let's go ahead.

25 Q. (By Mr. Sweeney) Mr. Hampson, this occurred during

1 the 1920's that you were making these trips?

2 A. Oh, yes.

3 Q. I think it was indicated that you have some familiarity

4 with the property even in the 1930's; is that correct?

5 A. Well, I kept going to Omak Lake on that road.

6 Q. With the same amount of frequency?

7 A. I visited the Whams there and hunted groundhogs there

8 and even went to Sunday dinner with them there.

9 Q. That went on in the 1930's?

10 A. Clear up to the '40's with the Whams.

11 Q. What happened in 1940?

12 A. What happened?

13 Q. Yes.

14 A. You mean right there?

15 Q. Well, what happened? Did the Whams stay there, or did

16 they move away?

17 A. I think they moved away.

18 Q. Then, you didn't visit the area following that time?

19 A. Yes. I was down there every year.

20 Q. How often?

21 A. Well, it would have been in the summertime to go

22 swimming down there, maybe several times a year.

23 Q. Several times a summer, and that was during the 1940's;

24 is that correct?

25 A. Yes.

1 Q I see.

2 MR. SWEENEY: I have nothing further, Your

3 Honor.

4 THE COURT: All right. Mr. Veeder?

5 MR. VEEDER: I have no questions.

6 THE COURT: Any redirect, Mr. Price?

7 MR. PRICE: None, Your Honor.

8 THE COURT: All right. I guess you may be

9 excused, Mr. Hampson. Thank you.

10 MR. PRICE: Your Honor, might I request the

11 Court's indulgence? Mrs. Johnson is my next witness

12 and she stepped out of the room for just a minute.

13 She is an elderly person, and I would like to get her

14 on her way as quickly as possible.

15 THE COURT: Did you want to take a few minutes?

16 MR. PRICE: Until she returns, and then we could

17 start with her.

18 THE COURT: Is this the lady coming in now?

19 MR. PRICE: Yes, it is, Your Honor.

20

21 CORAL WHAM JOHNSON, called as a witness on behalf

22 of the defendant herein,

23 having been first duly sworn,

24 was examined and testified as

25 follows:

1 THE CLERK: Would you please state your full
2 name to the Court and spell your last?

3 THE WITNESS: My full name? Coral Rue Hettie
4 Lincoln Wham Johnson. That's my full name. I'm
5 sorry.

6
7 DIRECT EXAMINATION

8 BY MR. PRICE:

9 Q. Mrs. Wham, will you tell us where you presently
10 reside, please?

11 A. Mrs. Johnson.

12 Q. Excuse me.

13 A. I was a Wham. Where do I --

14 Q. Where do you presently reside? Where do you live at
15 the present time?

16 A. In Wenatchee.

17 Q. All right. May I ask your age, please?

18 A. In a few days, I'll be 88.

19 Q. All right. Are you the daughter of Hettie Justice
20 Wham?

21 A. Hettie Justice Wham was my mother.

22 Q. Pardon me for the pronunciation. You have seen the
23 photograph that's being held by Mr. Walton?

24 A. Yes, I have.

25 Q. Does that depict any property with which you are

1 familiar?

2 A. Yes, it does.

3 Q. Did your mother and father purchase the property and
4 own that property for a period of time that's depicted
5 in the picture?

6 A. Yes. They bought it in 1920, from the old man Smitaken.

7 Q. There were some younger Smitakens?

8 A. There was two boys younger.

9 Q. At that time, all right. Now, you also resided in the
10 area north of this land, did you not?

11 A. Is that north? I don't know. I don't know whether
12 it was north or where it was. It was over this other
13 way from here.

14 Q. It would have been above the Mission and beyond the
15 Mission?

16 A. No, the Mission is between the two places.

17 Q. All right.

18 A. I was on the flat over toward the Okanogan River.

19 Q. All right. When your folks purchased this property,
20 were you familiar with it at that time? Did you know
21 whether or not there had been any irrigation going on
22 at the time before they purchased it?

23 A. There had not been.

24 Q. All right.

25 A. To my knowledge, I never saw anyplace where they had --

1 did any irrigating or anything on the place.

2 Q. Were there any buildings?

3 A. No buildings.

4 Q. All right. Did your parents build any buildings on
5 the premises?

6 A. They did.

7 Q. Do you know what years they would have?

8 MR. VEEDER: Your Honor, may I go over so I can
9 be close to the witness?

10 THE COURT: Yes. Go ahead, Mr. Veeder.

11 Q. (By Mr. Price) Do you know what year they would have
12 built those, or would that take a number of years?

13 A. Well, they had to build before they could -- as soon
14 as they bought the place, they had to build a home
15 to live in it.

16 Q. Are you familiar with -- were there property owners
17 living on either side of your folks' property when
18 they purchased it?

19 A. The either side? Well, Joe Peters lived, a Indian
20 lived toward the Mission. Now, I don't know which
21 direction.

22 MR. WALTON: That would be up here, Your Honor,
23 to the north.

24 Q. (By Mr. Price) That would be immediately north of
25 your folks' property?

1 A. Then, below the place toward Omak Lake was the -- I
2 can't say it when I want to -- you know the name.
3 Q. Is it Timentwas?
4 A. Timentwas.
5 Q. Were you familiar with whether or not there was any
6 irrigation being employed on the Joe Peters' place
7 immediately to the north of you or to the Timentwas'
8 place to the south of you?
9 A. I don't think so. I am not positive, but I'm pretty
10 sure there was not because the Indians did very little
11 work on their places.
12 THE COURT: What's that name you are using,
13 Counsel?
14 MR. PRICE: Mr. Hampson has me all concerned
15 because he pronounces it differently.
16 MR. VEEDER: Timentwa was what we used through-
17 out the trial, and Mary Ann Timentwa was a witness.
18 THE COURT: How do you spell it?
19 MR. MACK: T-I-M-E-N-T-W-A.
20 MR. PRICE: That's why the State is here.
21 THE COURT: They live to the south? The
22 Timentwas lived to the south.
23 Q. (By Mr. Price) Do you have a recollection of what
24 irrigation practices, if any, your family employed
25 on that property?

1 A. Yes.

2 Q All right. Now, how long after they purchased the
3 property did they undertake to utilize irrigation?

4 A. Immediately, as soon as they got the house so they
5 could live in it.

6 Q. Would that have been in the same year that they
7 purchased the property?

8 A. Yes, same year.

9 Q. Can you now take a little time, and if we can give
10 you a pointer, have you point to the photograph as
11 to those areas that you can recall that may have
12 been irrigated in one fashion or another, and then
13 allow Mr. Walton to designate on the corresponding
14 Exhibit T-W the area that you are pointing to?

15 A. This creek goes on clear through here, doesn't it?

16 MR. WALTON: Yes. No, no. The creek is right
17 here. It goes like this.

18 THE WITNESS: Well, and it comes down right
19 through here.

20 MR. WALTON: Right down the row of trees.

21 THE WITNESS: Well, then Daddy built -- well, he
22 put a little dam in the creek just above the place,
23 I mean above the houses far enough so that he could
24 raise the water and put a flume in and brought it out
25 here onto the alfalfa, and he put in the alfalfa as

1 soon as he could.

2 MR. WALTON: That's designated 15-A on T-W.

3 THE WITNESS: That goes down they said about seven
4 acres, and then he --

5 Q. (By Mr. Price) Excuse me. That's the area that Mr.
6 Hampson indicated approximately seven acres?

7 A. Yes, I think from what I heard him say.

8 MR. VEEDER: That was what you heard him say.

9 MR. PRICE: That's the field that she's talking
10 about as being irrigated.

11 THE WITNESS: This field here.

12 MR. PRICE: All right. Now, Mr. Walton, could
13 you give us an approximate location of the dam diver-
14 sion she has pointed to?

15 MR. WALTON: She pointed to a dam south of 10-A
16 in between 10 and 12-A.

17 MR. PRICE: On Exhibit T-W. All right.

18 Q. (By Mr. Price) Now, was there any other irrigation
19 undertaken by your folks?

20 A. Well, they irrigated this, and then Mother had a
21 garden out in -- let's see. This is where your
22 house is. She had a garden out in here, and she
23 raised a garden there. They brought water to that,
24 and then later on Dad had -- let's see. This is up
25 here. He had the corn field here.

1 Q Excuse me. You are now pointing to an area marked
2 10-A on Exhibit T-W. Please continue.

3 A Isn't that up -- this is up to Felice's -- no, it
4 isn't either. It's Joe Peters. This was up in here.
5 He had some corn in there. He had this little engine
6 that you were talking about and he pumped water for
7 that. Then, they planted corn. Now, the road comes
8 right here, doesn't it?

9 MR. WALTON: That's the driveway to the house.

10 THE WITNESS: The driveway. He planted a little
11 corn in here, and if I am not mistaken, right along
12 -- right in there, but this was subirrigated.

13 Q (By Mr. Price) Where did the subirrigation water
14 come from, to your knowledge?

15 A Well, we figured -- now, we are not sure.

16 MR. VEEDER: I am going to have to object to this,
17 Your Honor.

18 THE WITNESS: Yes. That ravine.

19 MR. VEEDER: The witness is just figuring and
20 guessing.

21 THE COURT: Just one moment. Let's stop for a
22 moment.

23 What is your objection, Mr. Veeder?

24 MR. VEEDER: The witness, and I am not being
25 critical, she said, "We just figured it just came from,"

1 and she didn't know where it was irrigated.

2 THE WITNESS: But, it was subirrigated. That's

3 all I can say.

4 MR. PRICE: Your Honor, this is part of the

5 family and one of the property owners, and I believe

6 the property owner has always been allowed to testify

7 what he thinks, or what she thinks, or to speculate

8 to that, and I believe that the property owner has,

9 at times, some good knowledge even though not

10 classified as an expert.

11 MR. VEEDER: The witness, the lady very properly

12 said --

13 THE COURT: What Mrs. Johnson really said was

14 it was subirrigated. We got that right.

15 MR. VEEDER: That's right.

16 THE COURT: Do you know, Mrs. Johnson, where the

17 source of the water was that was subirrigating the

18 land?

19 THE WITNESS: I can't prove anything. I know

20 that we didn't irrigate the corn.

21 THE COURT: Because it was subirrigated?

22 THE WITNESS: It grew. It was subirrigated.

23 THE COURT: All right.

24 Q (By Mr. Price) Now, calling your attention to the

25 middle of the picture, was there any acreage to the

1 south that you or your brother or father cultivated
2 or irrigated or farmed in any manner?

3 A. He cut hay here through here, and as far as I know,
4 I don't know whether they ever broke up the land or
5 not, but I know that he cut hay, and I know it was
6 up as high as their heads. I had a picture, but I
7 couldn't find it.

8 MR. PRICE: Mr. Walton, would you indicate where
9 she is pointing?

10 MR. WALTON: 25-A and adjacent to 3-A on T-W.

11 THE COURT: 25-A and 38?

12 MR. WALTON: Adjacent to 3-A, to the west of 3-A.

13 Q. (By Mr. Price) Mrs. Johnson, was the water withdrawn
14 from the creek to irrigate, was it subirrigated or
15 was there a spring in the area? Do you know?

16 A. Up here?

17 Q. Yes.

18 A. There was a spring up in here, but I can't say whether
19 it irrigated or not.

20 Q. All right.

21 A. But, there was a spring up there because we used to
22 get water when there was a house there and we did live
23 there in the wintertimes, my husband and I and the
24 children.

25 MR. PRICE: Now, Your Honor, the spring that she

1 has pointed to on the picture would correspond with --

2 MR. VEEDER: Can't we have the witness testify
3 rather than Counsel?

4 MR. PRICE: I would ask Your Honor's indulgence
5 just for clarification so that we have some coordina-
6 tion between the exhibits as to where we are talking
7 about. If I might approach the 1949 exhibit --

8 THE COURT: Yes. Go ahead.

9 MR. PRICE: The spring that she is talking about
10 would correspond to Defendant's Exhibit SSSS, our
11 Field 2 on that exhibit.

12 Q. (By Mr. Price) Mrs. Johnson, was the property --
13 pardon me. Was it cleared when your family came on
14 the land, or were there any wood patches?

15 A. It was not cleared. That was just Indian land. There
16 was a grove of cottonwood that came down about down in
17 here someplace.

18 Q. That's near the alfalfa field that's been described
19 previously.

20 A. At the bottom of the alfalfa field, and there was
21 patches of alkaline soil through here.

22 MR. VEEDER: Now, can we have an identification
23 of these things? I thought Mr. Walton was going to
24 identify those.

25 THE COURT: Yes. He better do that.

1 MR. WALTON: 15-A, west side of 15-A.
2 THE COURT: That would be where the cottonwood
3 was or where the --
4 MR. WALTON: Both.
5 THE COURT: All right.
6 MR. VEEDER: And the alkaline, where was that?
7 MR. WALTON: South of 15-A.
8 Q (By Mr. Price) Did your family undertake to clear any
9 of those wooded areas or that wooded area?
10 A I don't remember. I can't say that.
11 Q All right. What was done, if anything, with the area
12 that you have described as the alkaline area fields?
13 A Well, my Dad was trying to -- I don't know what he
14 put on there, something on those patches of alkaline.
15 I don't know whether it ever turned out all right or
16 not, but he pastured the rest of this, just pastured
17 it.
18 Q All right. He pastured it with what, horses, cattle
19 or --
20 A Well, he had -- they raised white faces. They raised
21 beef cattle.
22 Q Approximately how many?
23 A Oh, Mercy. I don't know. I'm just telling you what
24 I know. I don't know.
25 Q All right. Well, can you make your best effort? We

1 understand we are asking some questions a long way
2 back.

3 A. I wouldn't make a guess.

4 Q. All right. Let me pursue it.

5 A. And, then after --

6 Q. Just a minute, Mrs. Johnson. Would it have been more
7 than five?

8 MR. VEEDER: Your Honor, I think we have had a
9 lady say that she didn't want to guess, and I think
10 that should be enough.

11 THE COURT: Well, witnesses sometimes are con-
12 cerned about being accurate, although I think the
13 question is proper if she recalls if it was more than
14 five or less than 100.

15 A. Oh, there was quite a bunch. I would say around 100,
16 I imagine, because I know that that's what they were
17 making their living off of, the cattle.

18 Q. (By Mr. Price) Your folks were?

19 A. Yes.

20 Q. Where would those cattle get their stock water from?

21 A. Well, they would get the water from the creek.

22 Q. Your family continued to reside there, your folks
23 did, until the '40's, sometime in the '40's; is that
24 correct?

25 A. No.

1 Q All right. How long did they continue to reside
2 there?
3 A Well, I can't tell you. I know that, oh, it must
4 have been sometime in '39, about '37, or '39, because
5 they moved to Wenatchee in '44. I know that. I can't
6 remember. They had a house in Omak for a while.
7 Q Okay. Did your family have electricity to that pro-
8 perty when you lived there?
9 A No, no.
10 Q Did your father -- did the family hire hired hands
11 to operate the place from time to time?
12 A Only in hay. I think it was in the haying time.
13 Q Okay. Would you designate on the picture where they
14 cut hay, please?
15 A Well, in this alfalfa, on the alfalfa, and then, as
16 I said, I remember that I had a picture where they
17 were cutting hay up here, and I don't know if it was
18 just meadow hay or what it was now.
19 MR. PRICE: She again points to the area of --
20 MR. WALTON: 25-A, 3-A, adjacent to 3-A.
21 Q (By Mr. Price) Do you have a recollection of what
22 the economic conditions were like in the No Name Creek
23 area on the Walton property in the '30's?
24 A I couldn't say.
25 Q Do you have a recollection of any towns or commercial

1 centers being developed or started in that area of
2 your folks' place?

3 A. No.

4 MR. VEEDER: Are we through locating?

5 MR. PRICE: Yes. I think that's all I have.

6 Thank you very much, Mrs. Johnson.

7 THE COURT: Mr. Sweeney?

8

9

CROSS-EXAMINATION

10 BY MR. SWEENEY:

11 Q. Mrs. Johnson, you testified that your father, Mr.
12 Wham, had a little dam just above the house, and there
13 was a flume that brought water from there to a field
14 of alfalfa of about seven acres; is that correct?

15 A. That's what it's estimated at.

16 Q. Okay. Then, there was a small gasoline engine?

17 A. There was, above where he watered the corn that he
18 used on the other side of this stream.

19 Q. He pumped water out of the stream with a gasoline
20 engine?

21 A. Yes, yes.

22 Q. How large a field was that?

23 A. I think it was about two or three acres. Of course,
24 you know, I didn't measure it. I don't know anything
25 about measuring.

1 Q. Was there another field that was irrigated besides
2 those two that you just described?
3 A. Well, the garden patch, it was just a garden patch.
4 Q. How big was that approximately?
5 A. I can't tell you.
6 Q. Less than an acre, perhaps?
7 A. Oh, yes.
8 Q. Then, there was a subirrigated field; is that correct?
9 A. The corn patch above over -- just across over here.
10 Over in here was a corn patch.
11 Q. Was there any other irrigated land on the property
12 besides that?
13 A. Not to my knowledge.
14 MR. PRICE: Excuse me, Counsel. The understanding
15 is, Your Honor, that irrigated means man-made as
16 opposed to, I guess, subirrigated.
17 THE COURT: All right.
18 Q. (By Mr. Sweeney) There was no other man-made irrigation
19 on the property?
20 A. No.
21 Q. Was there any other naturally irrigated land?
22 A. Well, there was subirrigated -- that's naturally
23 irrigated, yes. No, there was no more than this corn
24 patch that I know of.
25 Q. That was subirrigated --

1 A. Yes, that was subirrigated.

2 Q. -- as we call it. Okay. Then, your parents moved

3 from this, what's now Mr. Walton's land, in about

4 1937, '38, or '39?

5 A. I can't remember when they left there. There was two

6 or three other parties between them, and so I can't

7 remember. I don't know how long they left -- they

8 lived in Omak.

9 MR. SWEENEY: Thank you, Mrs. Johnson.

10 THE COURT: Mr. Veeder, do you have any questions?

11 MR. VEEDER: I have no questions, Your Honor.

12 THE COURT: All right. Any redirect, Mr. Price?

13 MR. PRICE: Possibly, but I would ask for Counsel's

14 stipulation that I go back to some direct.

15 I have, and I have forgotten to ask her to

16 identify an historical document, which I would offer

17 as an historical document. It would be Mrs. Johnson's

18 brother's diary, 1923, and 1925, era, indicating and

19 evidencing a myriad of other things, fascinating

20 things, pumping, irrigating --

21 MR. VEEDER: Wait a minute. What is this now?

22 MR. PRICE: -- that sort of material.

23 THE COURT: It's a diary.

24 MR. VEEDER: Whose diary?

25 MR. PRICE: I will, with Counsel's indulgence,

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why don't we --

THE COURT: Why don't we take a brief recess and
you can take a look at it, Counsel.

(A recess taken at this time.)

1 THE COURT: Gentlemen, are you ready to proceed?

2 MR. PRICE: Yes, Your Honor.

3 May I approach the witness, Your Honor?

4 THE COURT: Yes. Go ahead, Counsel.

5

6

REDIRECT EXAMINATION

7

BY MR. PRICE:

8

Q. Mrs. Johnson, I am handing you what has been marked

9

as Exhibit VVVV. Could you identify that for the

10

Court, please? Tell the Court what it is.

11

A. This book was written by my brother before he passed

12

away. A part of it was put in here during the time

13

that they were working on the place, during the time

14

that they were working on this pump for fixing the

15

water for the corn field.

16

Q. Does this cover, in part, the years of 1923, and 1925?

17

A. I think so. It's in here, isn't it?

18

Q. In fact, some references are made to that in the

19

book.

20

A. Yes.

21

MR. PRICE: All right. We are offering that,

22

Your Honor. Her brother is deceased. We offer it

23

as historical documentation of a recordation of

24

actual practices or conduct connected with irrigation

25

as being relevant to establishing whether or not

1 irrigation practices were being undertaken.

2 THE COURT: All right. Are there objections?

3 MR. SWEENEY: Your Honor, I don't think it is
4 appropriate to put in a diary, apparently is what it
5 is, of another person even though Mrs. Johnson can
6 identify the handwriting, but there is no opportunity
7 to really ascertain what those notes meant or the
8 person who actually made the record is no longer here,
9 and we would object to that.

10 MR. VEEDER: I will interpose an objection to it
11 on the ground that Counsel indicated that it was a
12 chronicle of events in connection with a business
13 enterprise of the operation. Certainly, there is no
14 foundation for that. This is, in my view -- there
15 has been no proper foundation laid for that, and
16 until a proper foundation is made, we will necessarily
17 interpose our objection to it.

18 THE COURT: Well, is there any question but what
19 it's the diary or the memoranda of a person now deceased?

20 MR. VEEDER: Well, she said the person was dead,
21 and she said it was her brother. I'm not going to
22 contest that, but I am saying that from the standpoint
23 of the content of the exhibit, it doesn't appear to me
24 like a man was authorized or directed or kept it in the
25 course of business, and it has no relationship whatso-

1 ever to the issues in this proceeding. Therefore,
2 we would interpose an objection to it.

3 MR. PRICE: It comes under the exception of the
4 new Federal Rules, Your Honor, as an exception of the
5 hearsay rule, and maybe I'm on the wrong planet, but
6 I don't recall saying anything about business practice.
7 I recall it as evidencing irrigation practices being
8 utilized on the property in question during the time
9 in question.

10 MR. VEEDER: Yet, and this is what I said in the
11 first place, there is nothing to evidence what his
12 responsibilities were in connection with making those
13 entries.

14 THE COURT: I haven't looked at it yet. Are you
15 through interrogating about it?

16 MR. PRICE: Yes.

17 THE COURT: I am going to defer ruling on that
18 until I can do a little research on the question.
19 It boils down -- it's obviously hearsay and has to be
20 admitted under an exception to the hearsay rule if it
21 is admitted at all.

22 MR. VEEDER: We have no opportunity to cross-
23 examine, Your Honor.

24 THE COURT: Well, that's usually the problem with
25 hearsay. The question is not whether it's hearsay or

1 whether you have a right to cross-examine, but whether
2 it falls within an exception to the hearsay rule and
3 has adequate reliability, and that's a matter I'm not
4 satisfied at the moment on, so I will defer ruling
5 on it and I will rule on it in the morning. Does
6 that present a problem?

7 MR. PRICE: No. I would just ask a question,
8 not to be facetious, but would pose a question to the
9 witness as to whether this diary, whether there was
10 any controversy or litigation about water at the time
11 these entries would have been made to try and establish
12 that this was a chronicle, not for the purpose of
13 achieving an end, but just a diary.

14 THE COURT: All right.

15 Q. (By Mr. Price) Mrs. Johnson, at the time period your
16 brother was making these recordings, was there any
17 litigation, court litigation over water or an attempt
18 to establish the water rights at that time?

19 A. There was not.

20 Q. You mentioned maybe as many as 100 head of cattle.
21 Was that the only livestock or animals that you had
22 then?

23 MR. VEEDER: I object to this, Your Honor. He
24 asked to open direct examination in regard to the
25 diary, and now we are moving over to livestock. I

1 think that's improper.

2 THE COURT: Well, the Court has broad discretion
3 in the scope of testimony. He could always call a
4 witness back. I assume this is going to be brief?

5 MR. PRICE: Yes, Your Honor.

6 THE COURT: I will overrule the objection.

7 MR. VEEDER: This is from another subject matter
8 than from the diary?

9 MR. PRICE: That's correct.

10 MR. VEEDER: I have my objection.

11 THE COURT: The objection is overruled.

12 Q. (By Mr. Price) Mrs. Johnson, was there other livestock
13 besides cattle raised by your folks on the property
14 in question?

15 A. When my brothers left for college, Father was not able
16 to take care of the cattle, and so they started
17 raising sheep. There was sheep after that.

18 Q. All right. Do you have any idea of how many sheep
19 were being raised?

20 A. I couldn't tell you.

21 Q. All right. Do you know what the source of the stock
22 water was for the sheep?

23 A. I didn't --

24 Q. The source of the stock water for the sheep?

25 A. Well, it was just like the rest of the cattle. It was

1 drinking water.

2 Q. From the creek?

3 A. From the creek.

4 MR. PRICE: I have no further questions. Thank
5 you.

6 THE COURT: Any more cross?

7 MR. VEEDER: No.

8 MR. SWEENEY: No, Your Honor.

9 THE COURT: I guess, Mrs. Johnson, you are
10 finished now. You may be excused.

11 THE WITNESS: Thank you.

12 THE COURT: I would ask Counsel first, just right
13 off the bat on the hearsay question, Exception 16
14 to the Hearsay Rules refer to a statement or document
15 in existence 20 years or more, the authenticity of
16 which is established.

17 You need not discuss that now, but it is
18 something that you might want to look at.

19 MR. PRICE: I call Mr. Apple to the stand.

20 Your Honor, Mrs. Johnson would like to leave
21 the courtroom.

22 THE COURT: Yes. I might as well say that all
23 witnesses will be excused unless there is a specific
24 request that they remain.

25 MR. VEEDER: Mrs. Johnson can go as far as I'm

1 A. 43.

2 Q. What was the nature of your work there at the machine

3 shop?

4 A. Well, we sell pumps and service pumps and put in

5 irrigation systems.

6 Q. That was your main function?

7 A. Yes.

8 Q. Did you have to become familiar in doing that with the

9 requirements to put in an efficient irrigation system

10 over the years?

11 A. Yes.

12 Q. Let's say prior to 1940, what kind of irrigation

13 practices were being employed in the Okanogan area?

14 A. It was rural irrigation, ditches and mostly gravity

15 flow water, some pumps, low head pumps out of the

16 river.

17 Q. All right. What is a low head pump?

18 A. Well, low head is designated up to about 80 or 90

19 feet to just lift the water from a river up to the

20 highest point on the land without putting any pressure

21 on it.

22 Q. Is there a limitation to the amount of lifting you

23 could achieve in a low head pump?

24 A. Well, yes. The impeller is only built to lift water

25

1 so high in a low head.

2 Q For instance, how high could a low head pump of say
3 five horsepower lift water? Do you have any knowledge
4 as to that?

5 A Well, if it was low head, why, probably not over 20 or
6 30 feet, but if the impeller was different, why, five
7 horse should lift it pretty high.

8 Q All right. Did you, in fact, have anything to do
9 with the installation of an irrigation system on the
10 Boyd Walton property?

11 A Yes, yes.

12 Q When would that have been?

13 A Well, I don't recall exactly the year, but it was
14 somewhere around 1950, somewhere in that area.

15 Q Do you recall what that irrigation system consisted
16 of?

17 A Well, all they had was single-phase power.

18 Q Why is that relevant?

19 A Well, you can only go to about five to seven and a half
20 efficiently with single phase.

21 Q Five to seven and a half powered motor?

22 A So --

23 Q Is that your testimony?

24 A Yes.

25 Q All right.

1 A. So, we put in a phase converter; it was a Henry Phase
2 Converter, and they are good for about 75 to 80 percent
3 of power. So, in other words, you have to put 25 per-
4 cent more phase converter than what you are going to
5 take power.

6 Q. Would the system that you put in have been possible
7 prior to the bringing of power to the Walton property?

8 A. No.

9 Q. Are you familiar with the differences between rill
10 irrigation and what sprinkler irrigation can accomplish
11 in terms of the water requirements?

12 A. Well, when we sold the low head pumps for out of the
13 river.

14 Q. When you speak of the river, are you talking about the
15 Okanogan?

16 A. Okanogan or out of the lakes or wherever the source
17 of the water was, we always figured from 10 to 12
18 gallons a minute per acre.

19 Q. That would be for rill irrigation?

20 A. Yes.

21 Q. All right. Is there any difference in what you figure
22 when you employ sprinkler irrigation methods?

23 A. Yes. We figure that 6 gallon per minute per acre will
24 do it anywhere in Okanogan County.

25 Q. Would that convert in the same ratio of about two to

1 one in terms of acre feet when you are trying to
2 determine the amount of acre feet needed to get to a
3 plant for consumptive use?
4 A. Yes. You do it on one-half the amount of water.
5 Q. Okay. What I'm asking is, for instance, if it takes
6 four acre feet for the consumptive use of a plant
7 on a particular tract of land under sprinkler irriga-
8 tion, would it be reasonable to assume it would take
9 eight acre feet or more for rill irrigation, or not?
10 A. Yes, if you done the same job, it would.
11 Q. Have you been involved in installation of irrigation
12 systems on the Colville Indian Reservation itself?
13 A. Yes.
14 Q. Where was the Walton installation in terms of any
15 systems you may have employed for Indians on the
16 Colville Reservation?
17 MR. VEEDER: I can't hear what Counsel inquired.
18 May I have the question read?
19 (Pending question read.)
20 MR. PRICE: In terms of time; before, or during,
21 or after?
22 THE WITNESS: The first installation we done on
23 the reservation was for the Whitelaws over on the
24 Kittle River.
25 Q. (By Mr. Price) What period of time was that?

1 A. I believe it was around '49, or '50. It was right --
2 wasn't too long after aluminum irrigation came out.

3 THE COURT: What river was that, sir?

4 THE WITNESS: Kittle River.

5 THE COURT: Kittle River?

6 THE WITNESS: Yes.

7 Q. (By Mr. Price) What affect, if any, did the advent
8 of aluminum pipe have on terms of developing irriga-
9 tion systems, if any?

10 A. Well, in Okanogan County, it just about, oh, I'd say
11 a thousand percent. Land could go in where it
12 couldn't before. Just a few pastures was all that
13 could be irrigated where it was ideally located and
14 the slope is just right on the land.

15 Q. What kind of slope did you have to have for rill
16 irrigation?

17 A. Well, you had to have a drop of probably two or three
18 feet at least a hundred feet of land in the land,
19 you know, so that the water would run down the ditches.

20 Q. So, the fact that you had water available doesn't
21 necessarily mean you could rill irrigate; there were
22 other considerations that went into that?

23 A. Oh, yes. You had to be on a high point, and the water
24 all had to go downhill.

25 Q. Could some slopes of land be too steep or not, or is

1 that not a problem?

2 A. Yes, yes. If it would be too steep, it would wash.

3 Q. In terms of the manpower required for a rill irriga-

4 tion system as opposed to a sprinkler irrigation

5 system, do you have knowledge of any difference

6 involved there, if any?

7 A. Oh, yes. I'd say that when I first came to the

8 country for every 40 acres they had to have a permanent

9 irrigator. He was a steady -- it was a steady job

10 to irrigate 40 acres.

11 Q. By rill irrigation?

12 A. Yes.

13 Q. Is that necessarily required under a sprinkler irriga-

14 tion system?

15 A. Oh, no. You can, on 40 acres, why you can change

16 pipes, change the pipes in, I'd say, three hours at

17 least.

18 Q. In terms of rill irrigation versus sprinkler irriga-

19 tion, is there a difference if you are just developing

20 a field in terms of your ability to develop it given

21 a number of acres at a given time?

22 A. Yes. With sprinklers, developing alfalfa, you have

23 got to keep the top surface wet, so sprinklers does

24 a lot more efficient job than any other way.

25 Q. How often would it take? Do you have an opinion as to

1 how often it would take to administer a rill irriga-
2 tion system where you were trying to develop a new
3 alfalfa crop?

4 A. You've got to change the pipes every two or three
5 hours when you first start the system, so you are
6 limited pretty much to out of 20 acres, 30 acres,
7 it keeps a man pretty busy or even two men.

8 Q. How long have you been familiar with the Walton
9 property, the property itself, not as the Walton
10 property?

11 A. Well, we used to drive out by there going swimming
12 in the summer in the '30's, when it was so dry, but
13 I never did pay much attention to it, you know, just
14 drove down the road.

15 Q. All right. Did you ever observe any cultivation of
16 the property as you would drive by or as you went by?

17 A. I knew there was some activity there, and I know there
18 was at the lower end, there was meadows, hay meadows.
19 I remember that.

20 Q. In other words, hay was being cut in the lower meadows?

21 A. Yes.

22 Q. In terms of the power, single-phase power that comes
23 into the Walton property at this, I guess at this time,
24 this phase converter business that you talked about,
25 is that something that you normally like to do, or is

1 that something that's a good design, or is that
2 something you attempt to design around?

3 A. You never can get true three-phase power out of a
4 phase converter. One of the legs will be off, unequal.
5 So, if they get too unequal, it will burn the motor up.
6 Like I say, you can usually get by with using 75
7 percent of the power of the converter.

8 Q. Are you familiar enough with the lay of the land on the
9 Walton property to know whether portions of that
10 ground or all of it was available to be rill irrigated
11 or not?

12 A. No. I never paid that much attention to it.

13 Q. Did the economy have anything to do with the develop-
14 ment of irrigation systems in the Omak-Okanogan area
15 in the '30's, and '40's?

16 A. Oh, yes. It had all to do with it.

17 Q. How do you mean that?

18 A. Well, if a person had good land that was going that
19 could sprinkle irrigate, why they could bring that
20 land value up by probably triple by putting a sprinkler
21 system on it.

22 Q. Did the advent again of the sprinkler system -- is
23 that what you are saying or not -- had something to
24 do with the development of the valley?

25 A. It had practically all to do with it. So much went in

1 that could never have been done, you know, otherwise.

2 Q What period of time did that first become available,

3 the sprinkler system on a countywide basis?

4 A Well, we first -- when we first started selling

5 sprinklers, we had the steel pipe, and a fellow by

6 the name of Pierce built Pierce Couplers, and it was

7 a thing steel pipe with steel couplers on it. That

8 was in, oh, around '42, or '43, as near as I can recall.

9 Then, when the war was over, why they shipped all

10 this invasion pipe, you know, back in where they run

11 gas lines, and we had an awful lot of that for main

12 lines.

13 Q Would that be utilized with gravity flow, or would

14 that be utilized with power?

15 A No, with power.

16 Q All right.

17 A They had couplers on it, on these invasion pipes so

18 they could just lay it out and make a main line out

19 of it for the pressure.

20 Q What was your biggest year in sprinkler sales?

21 A My biggest year was 1948.

22 Q I am speaking economically now in terms of --

23 A We tried to put in a system every day for the spring

24 and summer, and we pretty well done it.

25 Q And to the best of your recollection, the system you

1 put in for the Waltons went in about 1950?
2 A. Somewhere in there. I don't remember exactly, but it
3 was -- couldn't have been too far off.

4 MR. PRICE: That's all I have. Thank you, Mr.
5 Apple,

6 MR. VEEDER: I have no questions.

7 MR. SWEENEY: I have no questions, either.

8 THE COURT: All right. I guess, Mr. Apple, you
9 go home free here. You may be excused. Thank you.

10
11 ALBERT E. BLOMDAHL, called as a witness on behalf
12 of the defendant herein,
13 having been first duly sworn,
14 was examined and testified as
15 follows:
16

17 THE CLERK: Would you please state your full
18 name, give it to the Court and spell your last?

19 THE WITNESS: Albert E. Blomdahl, B-L-O-M-D-A-H-
20 L.

21
22 DIRECT EXAMINATION

23 BY MR. PRICE:

24 Q. Mr. Blomdahl, where do you reside?

25 A. Okanogan.

1 Q How many years have you resided there?
2 A Since 1958.
3 Q Are you retired or employed at this time?
4 A I am retired.
5 Q What was your occupation prior to retirement?
6 A I was a conservationist with the USDA Soil Conserva-
7 tion Service since '46.
8 Q Out of what office did you work?
9 A Well, several offices, but in Okanogan since 1958,
10 and Twisp since '55, and then in Wenatchee in '47,
11 I guess, to '55, and then the first of the year I
12 think I was in Coulee City. That was in '46, right
13 after the war.
14 Q Are Twisp and Wenatchee and Okanogan considered to
15 be in the North Central Washington area? Is that
16 what is referred to as North Central Washington?
17 A I believe you can call all the places North Central
18 Washington, even Coulee City.
19 Q All right. What was your job function basically?
20 A Well, conservationists are supposed to have knowledge
21 of land use, and so I dealt with land use problems
22 that farmers had or ranchers had or might even
23 involve towns or municipalities even, but we dealt
24 in all phases of land use, and that might include
25 irrigation and agronomy, forest management, range

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management, whatever the ranchers grew if there was a crop.

Q All right. With your knowledge and experience in this job, can you tell the Court, because there is water and because there is land and the two are available to each other, does that necessarily mean that there should be irrigation?

A. Well, there are several factors involved in it. Basically, the first thing we do when we get on a piece of land is make a soil survey of it so we know what we have. It's a land inventory is what it amounts to. From that, we can tell what soils are irrigable and which soils are not irrigable, and also, of course, if you are going to irrigate soils you also would have to know where your source of water is, and if you get a 500-foot lift, it's not too economical to irrigate some land if that's the case, but if it's only 200 feet or less, well, then it gets in the range to where it's economical to irrigate it if you have got good land, good soils to irrigate.

Q What do you mean by economical to irrigate?

A. Well, we always figure it costs so much to put water on a piece of land, and if it exceeds, oh, at one time I guess it was \$5 an acre, and then it gradually became \$10 an acre, and I don't know what the apple

1 grower now figures the economic limit is, but I know
2 they are paying \$50 an acre, so I don't know.

3 Q. Are you telling this Court that the practicality of
4 irrigation may relate to the profitability of the crop
5 that can be grown on there at any given time?

6 A. That's right. If you have got a crop that has a high
7 return, you can afford to pay more for water.

8 Q. Do you know what the price of hay crops were going
9 for in the 1920's and '30's in the Okanogan area?

10 A. Let's see.

11 MR. VEEDER: I object to this, Your Honor. There
12 has to be some kind of a foundation laid for this
13 inquiry. He said he came here in '58. As an historian?
14 What has he done? I find no basis whatever for this
15 man to respond to the prices of anything, let alone
16 in Okanogan Valley in 1920.

17 THE COURT: The question is whether Mr. Blomdahl
18 knows what the price of those commodities were in this
19 area in the '20's and '30's. I suppose he can answer
20 that yes or no, and then we can determine it.

21 THE WITNESS: I will just say, no.

22 THE COURT: That solves that problem.

23 MR. PRICE: Take the easy way out.

24 Q. (By Mr. Price) In connection with your job, were you
25 familiar with whether farming of agricultural land in

1 the 1920's and '30's was having a difficult time in
2 general or not?

3 MR. VEEDER: I object to the question, Your
4 Honor. There has to be some kind of a foundation laid
5 for this man to come forth with an expert conclusion.
6 I submit, Your Honor, that there is no basis whatever
7 for a man who came into this area in 1958, to conclude
8 as to what the situations were in the 1920's.

9 I object to the question because there is
10 no foundation, and this witness is not qualified.

11 THE WITNESS: I believe all a person has to do
12 is read the papers and magazines and know there was
13 a depression in the 1930's.

14 MR. VEEDER: I object.

15 THE COURT: The question is, Mr. Blomdahl, do
16 you, of your own knowledge, know what the economic
17 conditions were in the area in question here during
18 those periods?

19 THE WITNESS: I know it was darn tough.

20 THE COURT: Other than the general Depression?

21 THE WITNESS: Well, I know at that time in the
22 1930's because I --

23 MR. VEEDER: Wait a minute, we have changed the
24 date here. We are at 1920, early 1920's.

25 THE COURT: Let's take them ten years at a clatter

1 THE WITNESS: I won't answer to the '20's.

2 Q. (By Mr. Price) In connection with your job, Mr.
3 Blomdahl, were you provided information -- was
4 information made available to you in connection with
5 your job that would apprise you of the economic condi-
6 tions for agricultural endeavors in the North Central
7 Washington area in the '30's?

8 A. Well, that's one of the phases of our job is to have
9 a little knowledge of economics, too, and know what
10 it costs to grow certain crops.

11 Q. That's one of the qualifications for your position?

12 A. We had that information from economists that we had
13 in our service, and they would help us on that.

14 Q. All right. Did you come by way of any information
15 with respect to economic conditions for agricultural
16 endeavors in the '30's in the North Central Washington
17 area?

18 MR. VEEDER: Object to this from here on because
19 this witness has said that he got the information from
20 economists, and it would all be hearsay.

21 THE COURT: Well, he also had a lifetime career
22 in the Soil Conservation Service. I think it would be
23 proper to permit him to testify. Again, I think the
24 objection goes to the weight. Go ahead, Mr. Blomdahl,
25 if you can answer it.

1 THE WITNESS: Economic conditions in the '30's?

2 MR. PRICE: Yes.

3 THE WITNESS: Well, it was poor, let's put it that
4 way.

5 Q (By Mr. Price) Is one of your functions to assist a
6 farmer in designing irrigation systems for the
7 property?

8 A Yes. We have to be aware of the costs involved in
9 that so the farmer would always ask us what's it going
10 to cost me in order to make it feasible, you know, and
11 so we would come up with a ball park figure, and we
12 never come up with the exact figure because you have
13 to go to a dealer and find out the exact information.
14 All we could do is provide you with the design of a
15 system.

16 Q When you were with the Okanogan office, did you become
17 familiar with the Wilson Walton, Boyd Walton farm
18 area?

19 A Yes, I did with Wilson Walton and the farm there.

20 Q All right. Are you familiar with whether or not your
21 service provided an irrigation design program for the
22 Walton property?

23 A Yes. Our agency provided some engineering assistance
24 on it, their irrigation help on it.

25 Q Did that system -- was it designed with the idea of

1 electric power being involved or utilized?

2 A. Oh, yes. We had electric power at that time.

3 Q. Are you familiar with whether or not the Waltons
4 followed appropriate conservation methods in the
5 development of their farm?

6 A. Well, you just about had to because of the fact he
7 was limited in horsepower that he could use on the
8 place. He had single-phase power which was already
9 brought, so he was limited in horsepower that you could
10 use in order to irrigate it, so he had to go to several
11 pumps in order to irrigate, you know, additional
12 acreage.

13 So, in order to get by, well, he couldn't
14 use three-phase power, then you would have no limit
15 on your horsepower, but he was limited on the horse-
16 power that he had.

17 Q. Within the limitations that the Waltons had on the
18 place, was he able to employ good conservation prac-
19 tices and methods?

20 A. Yes, I believe he did. He tried to practice the
21 irrigation dope that we tried to follow with him. We
22 based our irrigation on consumptive use of a quarter
23 inch a day, and we tried to explain to him this is what
24 the crop needs, and you have got soils here that will
25 take it maybe two weeks between irrigation or another

1 one that would take it three weeks between irrigation,
2 so we would have to have a system designed for that
3 purpose. Otherwise, you are going to be over
4 irrigating, and they also, I guess, had good enough
5 practices that he became Conservation Farmer of the
6 Year one year when they still had that program in the
7 Conservation District.

8 Q Do you have any idea approximately what year that would
9 have been?

10 A I'd say in the early '60's, but I don't know what year.
11 I would have to look it up.

12 Q Do your conservation plans -- have you ever dealt with
13 subirrigated lands as part of a conservation program?

14 A Yes.

15 Q Are those lands -- do you design systems to irrigate
16 those lands, or do you employ the subirrigated lands
17 in some other fashion?

18 A They are a little difficult to irrigate. In fact, we
19 don't recommend irrigating subirrigated lands. Nor-
20 mally we don't because you have a problem. You have
21 got a problem on drainage, and if you go irrigating it,
22 you just drown the crop out or maybe you will get an
23 alkaline condition as a result of it, and you won't
24 grow nothing.

25 Q Does that mean that that land can't be used for crop

1 purposes, or is it just utilized in a different manner?

2 A. If it's alkaline, then you are limited to probably
3 tall wheat grass as your main crop because it's one
4 grass that will grow in alkaline ground where hardly
5 -- it's difficult to get anything else to grow in it.

6 Q. Would your office then advise that the tall wheat
7 grass be farmed or cultivated?

8 A. We did that in the case of Wilson Walton. There was
9 one piece that was pretty alkaline so we recommended
10 tall wheat grass in there, and for some reason tall
11 wheat grass is kind of a soil conditioner, too, and
12 eventually, you get to a less PH on it if you go it
13 long enough.

14 But, if you are going to go commercial crop
15 on it, you have to have a tremendous amount of sulphur
16 and probably manure on it if you are ever going to have
17 a chance to grow a crop, and it makes it pretty
18 expensive.

19 Q. In other words, it may take a period of time, a number
20 of years to develop a particular piece of ground for
21 commercial cultivation?

22 A. It would on -- if it's alkali, why that's a low
23 priority piece of ground that you are ever going to
24 try to irrigate or ever put water on occasionally.

25 Q. When you say low priority, is there a priority system

1 in which you try and get water to the highest priority
2 and work your way down or not?

3 A. Well, we try to do it on the basis of the most pro-
4 ductive land. We say that this piece of ground is
5 more productive than another piece, and that's where
6 you ought to put your marbles there in the first place
7 before you go to the other pieces of ground.

8 Q. All right. Does a conservation plan or program that
9 you devise, is that put into effect all at once in
10 one harvest year or --

11 A. No. It is a progressive deal. It's never done in
12 one time. There are very few farmers or ranchers that
13 got the money to do it all at one time, and I doubt
14 if there is one in a hundred that can do it at one
15 time.

16 Q. The fact that land may not be irrigated by man methods,
17 manual methods or mechanical methods, but that is sub-
18 irrigated can still be cultivated in terms of taking
19 crops off of it; is that correct?

20 A. Well, yes. You can still cultivate it. You don't
21 want to cultivate it too much because, why, you are
22 limited to the crops you can grow.

23 Q. Let's go a step further. Say you don't cultivate it,
24 but you harvest the crop that -- the ground cover
25 that's there. Is that feasible?

1 A. Yes, that's feasible.

2 Q. Is that done -- are you familiar with that being
3 done?

4 A. Yes, we have had ranchers that grow tall wheat grass
5 on this type of ground and then they get their wheat
6 growth, and then you get another crop coming.

7 Q. That's used for what, hay?

8 A. Hay or use it for pasture, if you don't hay it, or
9 use a combination of both.

10 Q. Do you have an opinion as to whether the water consump-
11 tion is greater on subirrigated land where it's cut
12 or hayed as opposed to subirrigated land that is
13 just left idle?

14 A. Well, if a crop goes dormant, then your consumptive
15 use you may just as well forget about it. You don't
16 have any more consumptive use because the crop is
17 not grown anymore.

18 If you cut it, why, then you can get another
19 crop in there, so your consumptive use is still going
20 to be the same as if you irrigated that piece of
21 land because the climate dictates what your consumptive
22 use is going to be.

23 Q. So, the fact that you are not cultivating, but if you
24 were haying the land doesn't mean that you are not
25 consuming water?

1 A. If you are haying land, you are going to be consuming
2 water, yes.

3 Q. Okay. Is one of the functions of your service with
4 which you were formerly employed to monitor an
5 individual farmer to determine whether or not he is
6 putting into effect the program that's been designed
7 or not?

8 A. Well, we used to have -- we used to check irrigation
9 systems to see how efficient they were, and we'd check
10 sprinkler irrigation, and we'd check the rill irriga-
11 tion, and we would find some systems pretty efficient
12 and others really inefficient.

13 I have checked when we had rill irrigation
14 where they used six times the amount of water that
15 they were supposed to use because the soil was just
16 too sandy and should never have been rill irrigated
17 in the first place.

18 Q. In connection with the Walton premises, are you
19 familiar with whether they have used reasonable
20 methods in developing the property according to the
21 plan developed by your service?

22 A. Yes. Well, they followed the recommendations of the,
23 you know, of the irrigation. We recommended so much
24 water be applied to that piece of land, and they
25 tried to follow that out because we put sprinklers on

1 designed to put so much water on that land, and if
2 you operate it on a certain pressure with a certain
3 nozzle size, it can only put out so much water, and
4 the only way you can overirrigate is, say, this time
5 of the year or the fall of the year.

6 We designed systems for the peak period of
7 the year, not for May or June or September. We
8 design for July and August.

9 Q. So, it is possible in the early season or late season
10 that there might be some evidence of overirrigation?

11 A. You could have overirrigation at that time.

12 Q. And still be consistent to the plan that had been
13 designed for the property?

14 A. Yes. The only main thing is you need to follow up
15 with those people and remind them that this time of
16 year the consumptive use is not a quarter inch a day,
17 but it may be a tenth of an inch a day.

18 Q. And it was after your service implemented the design
19 for the Walton system that Mr. Wilson Walton was
20 awarded the Conservationist of the Year Award or
21 whatever?

22 A. Well, yes. It was after we worked with him I think
23 for quite a while there.

24 Q. Okay.

25 MR. PRICE: That's all I have. Thank you, Mr.

1 Blomdahl.

2 THE COURT: Mr. Sweeney, do you have any questions?

3 MR. SWEENEY: No, I don't, Your Honor.

4 THE COURT: Mr. Veeder?

5 MR. VEEDER: I would like to ask some questions,

6 Your Honor.

7 THE COURT: All right.

8 MR. VEEDER: May I approach the witness with

9 this exhibit over here?

10 THE COURT: Yes.

11

12 CROSS-EXAMINATION

13 BY MR. VEEDER:

14 Q. Now, are you familiar -- how do you pronounce your

15 name?

16 A. Blomdahl.

17 Q. I'll just call you Mr. Blum.

18 MR. PRICE: I think Counsel can refer to Mr.

19 Blomdahl by his correct name.

20 MR. VEEDER: I didn't hear.

21 MR. PRICE: I think Mr. Veeder can refer to the

22 witness by his name..

23 THE COURT: I think that would be appropriate.

24 MR. VEEDER: Well, I would like to, but I didn't

25 hear the last part of his name.

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THE COURT: His name is Blomdahl.

MR. VEEDER: Would you spell it? I want everybody happy.

THE WITNESS: B-L-O-M-D-A-H-L. That's a Scandinavian name.

Q (By Mr. Veeder) Yes, sir. Now, Mr. Blomdahl, I didn't intend any insult to you. I just didn't know how to pronounce it.

Are you familiar, Mr. Blomdahl, with the lands that have been depicted on Waltons' Exhibit, as I see it here, I-W (sic), are you familiar with this map at all?

A. Well, I may have seen it before.

Q Are you familiar with the land in the southern -- I will orient you on this. This is south.

THE COURT: Mr. Blomdahl, you can step over closer if it would be helpful to you.

THE WITNESS: I was just trying to see where it was.

THE COURT: Why don't you put it up on the board, gentlemen, and then you won't have to bend over.

THE WITNESS: I think I know where you are, though.

Q (By Mr. Veeder) Have you made any studies as to the ground water, the level of the ground water table in the area which, for your identification, is marked

1 1-A here? Are you familiar with that area south now?
2 I am pointing to Exhibit T-W. I am putting my finger
3 on here for you to observe. That is 1-A. Are you
4 familiar with that area and south from there on the
5 Walton property?
6 A. I know where the ranch is, and I know where the ranch
7 is, but that particular ground is -- I don't know
8 unless I seen a photo of it, and then I can tell you,
9 but right now, you have got a section line and I haven't
10 been out there for a while, so I don't know.
11 Q. How long has it been since you were out there?
12 A. Oh, probably been since -- I don't know, three or four
13 years, I guess.
14 MR. PRICE: Your Honor, if I might interrupt it
15 might speed things along. We have some photographs
16 available that would refresh the witness's memory.
17 It might speed the proceeding along.
18 THE WITNESS: Something that I could recognize.
19 I could read one of these maps if I could get oriented
20 on it. There is no question of that, but right now,
21 I haven't seen this map for a long time.
22 MR. VEEDER: All right.
23 THE WITNESS: But, then that No. 1-A or 3-A, or
24 whatever it is --
25 Q. (By Mr. Veeder) All I am doing is trying to orient you

1 so that you can see from this area southward and ask
2 if you remember or are familiar with the ground water
3 table in that area.

4 A. Well, at one time we dug holes all through that area
5 through the southern part and also up by the buildings,
6 and we could tell at that time where the water table
7 was.

8 Q. Where was it at that time?

9 A. I couldn't tell you exactly where it was.

10 Q. You don't remember?

11 A. No.

12 Q. Was it a high ground water table?

13 A. I would say it's pretty high, yes, part of it. Yes,
14 down near the creek part.

15 Q. Are you familiar with the geology in this regard to
16 the --

17 A. Yes, it's basalt.

18 Q. Are you familiar with what they call the granitic lip
19 down there?

20 A. No. You are talking about the side hills through
21 there now.

22 Q. No, no. I am talking about the area immediately right
23 at and immediately below the Walton property.

24 A. Oh.

25 Q. Are you familiar with the cascade there where the No

1 Name Creek drops off and there is sort of a fall
2 there?
3 A. No, I am not too familiar with that part of it, no.
4 Q. So, as a matter of fact, you haven't really made an
5 intensive study?
6 A. Not on that part, no.
7 Q. No.
8 A. I think more of it is in the upper end there.
9 Q. All right.
10 A. Where more of the crops are grown.
11 Q. So, you didn't really -- you are not testifying in
12 regard to this portion? I will just -- from this
13 No. 1-A here, southward you are not testifying about
14 that at all?
15 A. I would have to look it up on the maps and see what
16 we did. That's the only thing I can refer to.
17 Q. But, you have no recollection on it now?
18 A. No, I have no recollection of it now.
19 Q. Now, are you familiar with the area which is marked
20 3-A and on over to 25-A? Are you familiar with that
21 area?
22 A. Well, I'd have to look at it to see what you were
23 talking about.
24 Q. So, you wouldn't want to have your testimony pertain
25 to those two or three areas to which I have just

1 referred because you don't know?

2 A. First, I would have to see area photos to recognize

3 it.

4 Q. So, you don't know; you can't identify it by any

5 present recollection?

6 A. I don't even know if you are talking about above the

7 road or below the road.

8 Q. Just for the record, let's talk about above the

9 road.

10 A. I know there was a piece above the road. There was

11 crop in there.

12 Q. Do you know what the condition of their water table

13 was below the road?

14 A. Well, that would be a higher water table there.

15 Q. Pretty high water table?

16 A. But, above the road there wouldn't be.

17 Q. Now, can you describe the ground water table as we

18 move northward where we have 20-A on there now that's

19 close to the road? It is right at the road now. Are

20 you familiar with that area? We are talking about the

21 ground water table.

22 A. Is that right near the road?

23 Q. Yes.

24 A. There is one area in there where we put in some

25 drainage.

1 Q Where would that be?

2 A Now, I can't tell you from that map where it is.

3 Q You did put in drainage?

4 A It was a higher water table. I guess at the time,

5 we were trying to bring it down towards the creek.

6 Q Yes. Now, are you familiar with an alkaline area?

7 Did you find any alkaline areas in there when you

8 were studying it?

9 A The alkaline areas were down by the creek and the

10 other side of the creek where the biggest alkaline

11 area was.

12 Q What normally produces an alkaline situation there?

13 A Poor drainage.

14 Q That's right. Now, are you familiar -- have you been

15 able to orient yourself to know why -- to know where

16 the homestead is and farms?

17 A I don't know from what you are talking about now where

18 the homes are now, no, not on that particular map.

19 Usually, we have symbols for homestead and stuff,

20 and I don't even see it on there. I don't even see

21 a road.

22 Q How many times were you on this property?

23 A Oh, gee. I don't know. I have been on it, oh, I

24 suppose two or three times a year, I guess, somewhere

25 around in there.

1 Q But, you still don't -- you don't recognize, are you
2 familiar with where the sump is?

3 A Yes, down by the creek, yes.

4 Q The sump? Now, is that down by the creek?

5 A Well, there was a sump down there. There is also one
6 up -- no, I don't know about that.

7 Q Would it be safe to say that you don't have any real
8 familiarity with the area in the whole southern
9 section of the farm? Would that be correct that you
10 don't have intimate knowledge of it?

11 A I don't have a great -- no. That's probably right.

12 MR. VEEDER: I don't have any further questions.

13

14

REDIRECT EXAMINATION

15

BY MR. PRICE:

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19

20

Q Mr. Blomdahl, your testimony regarding the purposes
and activities of your office, what your office is
supposed to do and what it intends to carry out, is
that what you testified to? Is that what you testified
to here today?

21

A Yes.

22

23

24

25

Q And in connection with the specifics, did you or did
Mr. Bennett, or did somebody else -- were they
involved in actually working out the specific plan?
A Mr. Bennett was. He was our engineer and we'd have

1 him help on the irrigation phase of it.

2 Q. All right. Do you know where -- strike that.

3 Do you know where Mr. Bennett is today?

4 A. He might be in Nebraska for all I know.

5 Q. That's, in fact, where he is?

6 A. Because I haven't seen him since fishing season, and
7 that's not like him. Usually, I hear from him or
8 know where he is, and so I figured he's not in town,
9 unfortunately.

10 MR. PRICE: May I approach the witness, Your
11 Honor?

12 THE COURT: Yes. Go ahead, Mr. Price.

13 Q. (By Mr. Price) Showing you what has been marked as
14 Defendant's Exhibit WWWW --

15 MR. VEEDER: Can I approach the witness, Your
16 Honor?

17 THE COURT: Yes.

18 Q. (By Mr. Price) Can you identify that exhibit, please?
19 I want you to look at it.

20 A. This is what we call a soils map here. This is also
21 some land use figures in here, too, so it looks like
22 a combination map.

23 MR. VEEDER: You didn't do this or make this
24 yourself?

25 THE WITNESS: Well, I may have helped draw part of

1 this up all right, but usually, we get a name on here
2 who has done it. I don't see any name on it.

3 Q. (By Mr. Price) Can you identify those records as
4 being records that would be prepared by your office?

5 A. It was prepared by our office.

6 MR. VEEDER: But, you don't know who did the work?

7 THE WITNESS: I don't recall right now whether I
8 did it or had somebody else do it. You know, we
9 have people that do some lettering for us and draw
10 lines for us, and then we get together with the farmer
11 and designate these different land uses on it. This
12 is a copy of a soil survey here. I know I didn't do
13 that.

14 Q. (By Mr. Price) Mr. Blomdahl, are those things that
15 are prepared by your office?

16 A. They are prepared by our office.

17 Q. Yes, I am not interested in whether you prepared them
18 personally.

19 A. But, that doesn't mean that I prepare them.

20 Q. Would you look through each of the documents there
21 quickly, please, and see if those documents are
22 prepared in your office in connection with --

23 A. Yes. These are soil legends which is standard with a
24 farm plan, and this would give you the capability,
25 land capability classification.

1 Q Have those land classifications been transferred to
2 the maps that you looked at earlier?

3 A Usually. Well, I see they are here. It's got a
4 four, and I am not sure. It looks like they have been
5 transferred.

6 Q Would you look through the rest of the documents,
7 please, and see if they are prepared by your office
8 or utilized by your office?

9 A This is stuff that we use out of our office, yes.
10 Then, this is the -- we used a color capability class
11 at one time, but we don't do that anymore.

12 Q Would the documents that are in there that are
13 utilized by your office relate to the designations
14 that are demarcated on the maps?

15 A Yes, they are related to it. Yes, most of this is
16 soils information.

17 MR. VEEDER: May I ask a question on voir dire?

18 THE COURT: Nobody has offered anything yet.

19 MR. PRICE: I am still waiting for him to identify
20 it.

21 THE WITNESS: This is part of the farm plan
22 right here showing the different fields and the use,
23 and then it gives practices here regarding irrigated
24 crop land.

25 THE COURT: Is this an official file relating

1 to the property under discussion here?

2 THE WITNESS: Yes. This is the, I suppose, the
3 farmer's copy. Usually we have a copy in our office,
4 too, you know, a file copy in the office, too.

5 MR. PRICE: I am not able to tell, Your Honor,
6 from the previous transcript -- we delayed Mr. Bennett's
7 testimony overnight, and supposedly, a file was -- the
8 official file was to have been brought in, and I have
9 not been able to decipher whether that file was ever
10 made available to the Court, and I think it should be
11 made available.

12 THE COURT: What does it prove?

13 MR. PRICE: It just has to do with the plan that
14 was drafted for Wilson Walton and evidenced by this,
15 by testimony from this witness, that it was followed
16 and put into effect.

17 THE WITNESS: This is the agreement they have with
18 the Conservation District, you know, when you become
19 a cooperator.

20 MR. PRICE: The purpose is to evidence an inten-
21 tion by the Waltons to put the water to appropriative
22 use within an appropriate manner.

23 THE WITNESS: This came out of our office all
24 right,

25 MR. PRICE: I would offer it for that purpose,

1 Your Honor.

2 THE COURT: All right. Now, Mr. Veeder, you may
3 now inquire on voir dire.
4

5 VOIR DIRE EXAMINATION

6 BY MR. VEEDER:

7 Q. Was this plan prepared by you, the material we were
8 just looking at here?

9 A. This plan was not prepared by me because it was
10 dated 1949, which is prior to the time I came there.

11 Q. So, you couldn't testify as to personal knowledge on
12 this?

13 A. Now, I know --

14 Q. Just a minute. That's a yes or no. You cannot
15 testify as to the content of this exhibit, this farm
16 plan?

17 A. I can testify --

18 Q. Just a moment.

19 THE COURT: Just one at a time, gentlemen.

20 MR. VEEDER: Your Honor, Your Honor --

21 THE COURT: You asked him a question. Let him
22 answer that.

23 MR. VEEDER: I asked the question and I am trying
24 to get a yes or no answer.

25 THE COURT: If you don't stop talking at the same

1 time, we won't have a record here.

2 MR. VEEDER: Well, Your Honor, I don't know what
3 to do. I have a witness that's answering a question
4 not asked, so I am going back again.

5 THE COURT: Ask him a question.

6 MR. VEEDER: I'll ask him a question.

7 THE COURT: And you wait until he asks you a
8 question until you answer it, okay?

9 THE WITNESS: Yes, sir.

10 Q. (By Mr. Veeder) Now, you didn't come in until 1958,
11 did you?

12 A. Yes, sir.

13 Q. And this material was prepared in 1949, right?

14 A. That's right. That's what it says there.

15 Q. All right. Now, so the data was not prepared by you;
16 is that right?

17 A. Not by me personally.

18 Q. And it was not prepared under your direction, was it?

19 A. No, sir.

20 MR. VEEDER: I object to the evidence. I object
21 to the offer. There is no basis for offering that
22 matter in evidence. We have no opportunity to cross-
23 examine whoever prepared it. We have no way of knowing
24 who did the work, and my objection is that this matter
25 has not had a proper foundation laid, and it cannot be

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offered.

THE COURT: Mr. Sweeney, is the original file here?

MR. SWEENEY: Not that I know of. I don't know.

THE COURT: Was it in the earlier trial?

MR. VEEDER: No, it was not.

MR. SWEENEY: I think that --

THE COURT: Well, if the government has an official file relating to the irrigation plan for this property I think one way or another if it is available it should be furnished so we don't get into this type of a discussion.

MR. PRICE: I think Mr. Wilson Walton can, or when we take his deposition or he will testify, he will testify that that's his record from his personal farm copy. We will get it in that way if we have to, but I will avoid this harangue if --

THE COURT: It would certainly seem to me that an official government file relating to an irrigation study on the land in question here would certainly be relevant to something.

MR. SWEENEY: Your Honor, I can make inquiries after the session and ascertain its location, Your Honor.

THE COURT: Well, I don't mean to put you to the

1 burden of proving the plaintiff's case, but this is a
2 rather unique proceeding where we don't have our
3 usual pretrial proceedings where we would have all
4 exhibits identified, but I think in some manner, if it
5 is relevant, it should be in some manner introduced
6 or at least available, and then we can argue eviden-
7 tiary questions about it.

8 MR. PRICE: I believe it was an oversight because
9 the record does show we excused Mr. Bennett for the
10 evening. He came back the next morning, and he was
11 to have his file that next morning. It was for the
12 purpose of getting his file into the record, and I
13 don't find it in the record.

14 THE COURT: Well, let's pass it for the moment.
15 You feel it can be identified as part of the Walton
16 file, then?

17 MR. PRICE: Yes, Your Honor.

18 THE COURT: Are there further questions for
19 Mr. Blomdahl?

20 MR. VEEDER: I have nothing further.

21 MR. SWEENEY: No, Your Honor.

22 THE COURT: Mr. Price?

23 MR. PRICE: No.

24 THE COURT: I guess you may be excused, then.
25 Thank you.

1 MR. PRICE: We would like to recall at this time
2 Boyd Walton, Your Honor, for the limited purpose of
3 identifying or cross identifying exhibits -- excuse me,
4 Exhibit SSSS in terms of the fields as were testified
5 to by Mrs. Wham.

6 THE COURT: All right,
7

8 WILLIAM BOYD WALTON, recalled as a witness on behalf
9 of the defendant herein, having
10 been previously duly sworn,
11 resumed the stand and testified
12 further as follows:
13

14 DIRECT EXAMINATION

15 BY MR. PRICE:

16 Q. Mr. Walton, you listened to and observed Mrs. Wham --
17 not Mrs. Wham, but Mrs. Johnson's testimony here
18 today; is that correct?

19 A. That's correct.

20 Q. And she described a field in the north and around
21 below the location of the presently-existing house
22 on the property; is that correct?

23 A. Yes, sir.

24 Q. Can you relate the fields that she described as being
25 under irrigation by her family with Exhibit SSSS?

1 A. Okay. She, using this map and the pointer, located
2 the field to the south of the house which is the field
3 designed by 15-A on T-W, and is also designated by
4 the upper purple field on SSSS.

5 Q. Now, the upper field on SSSS that you have designated
6 as Field No. 1?

7 A. Right.

8 Q. What was the significance of that field?

9 MR. VEEDER: I am going to object to this, Your
10 Honor. There is no way that this witness can testify
11 as to the significance of somebody else's testimony.

12 MR. PRICE: Now, excuse me. I will rephrase
13 the question, Counsel.

14 THE COURT: All right. That takes care of that.
15 Go ahead.

16 Q. (By Mr. Price) What does that on Exhibit SSSS signify?

17 A. Field No. 1 on SSSS signifies a field which is in
18 alfalfa.

19 Q. As of what time?

20 A. It was being irrigated by us in 1949, flood irrigated
21 and is presently sprinkler irrigated.

22 Q. And was there any evidence of irrigation on that field
23 when you came to the property in '49?

24 A. Yes, there was.

25 Q. How about Field No. 2 on Exhibit SSSS? That depicts

1 what?

2 MR. VEEDER: Just a moment. I am extremely
3 interested in this course of conduct. I have no objec-
4 tion to Mr. Walton assisting Mrs. Johnson, but I cer-
5 tainly don't think he can go back and testify now,
6 and I am objecting if he tries to testify in regard
7 to matters that she -- concerning what she offered in
8 evidence.

9 Now, this is an effort to amplify another
10 witness's testimony, and I interpose an objection to
11 it. If the questions should have been asked when she
12 was here -- she's an old lady. We took it easy on
13 her, but I don't think we can go back now and amplify
14 matters which she testified to.

15 THE COURT: I don't think that's what we are doing,
16 is it?

17 MR. PRICE: That certainly wasn't it.

18 THE COURT: Well, rephrase -- ask the question
19 again. I don't understand the objection.

20 Q. (By Mr. Price) Mr. Walton, Field No. 2 on Exhibit SSSS
21 depicts what?

22 A. A field which was being irrigated which we irrigated
23 in '49, by flood irrigation, and a field which I am
24 presently irrigating.

25 Q. Does it relate to an area or fields that Mrs. Johnson

1 pointed out on the --

2 MR. VEEDER: This is what I object to.

3 THE COURT: Well, Mrs. Johnson pointed out certain
4 fields. As I understand the line of this testimony
5 is to indicate in the record and to the Court the
6 present status of the tracts that Mrs. Johnson stated
7 that she observed under irrigation; is that correct,
8 Mr. Price?

9 MR. PRICE: Yes, and also as to whether or not
10 there was evidence that those fields had been irri-
11 gated when the Waltons came to the property.

12 THE COURT: Well, I will permit it. Go ahead.
13 I will overrule the objection.

14 Q. (By Mr. Price) All right.

15 A. As I stood here, Mrs. Wham pointed to a field here
16 which is designated in T-W as 25-A, and which I
17 designated in purple the southern field in SSSS.

18 Q. And what observations, if any, did you make as to
19 that property when you came on the property?

20 A. That there was a ditch and it was capable of being
21 irrigated with a very, very quick movement of dirt
22 with a hand shovel.

23 Q. Was there or was there not any evidence that it had
24 been irrigated in such a fashion?

25 A. The ditch was there. The pipe was there. All you had

1 to do was place the pipe in the creek and it was
2 gravity fed from there.

3 Q Was there any evidence on the field that it had been
4 cultivated or irrigated?

5 A There was a type of grass growing which would lend
6 itself toward water. It was a grass which requires
7 lots of water to survive.

8 MR. PRICE: I have no further questions.

9 THE COURT: All right. Any cross, Mr. Sweeney?

10

11

CROSS-EXAMINATION

12 BY MR. SWEENEY:

13 Q Mr. Walton, you said that Field No. 2, there was
14 evidence that you just had to put the pipe in the
15 creek?

16 A That's correct.

17 Q Well, isn't Field No. 2 -- wasn't that from the spring?

18 A Yes.

19 Q So, you don't really mean No Name Creek?

20 A I didn't say No Name Creek. I don't think there is
21 a volume flow for the difference between a spring or
22 a creek, is there?

23 Q No, but that's out of a creek.

24 A No Name Creek is also a spring.

25 Q Well, I was just trying to make sure.

1 A. This was -- this field was not irrigated from No
2 Name Creek.

3 THE COURT: I think the record is rather clear
4 that that field was irrigated from a spring.

5 MR. SWEENEY: I have nothing further, Your Honor.

6 MR. VEEDER: I have nothing.

7 THE COURT: I guess you are through, Mr. Walton.

8 MR. PRICE: The plaintiff would rest, Your Honor,
9 or I think I would change that to the defendant.

10 THE COURT: How do you gentlemen elect to
11 proceed?

12 MR. VEEDER; Your Honor, I would, at this time,
13 like to file with the Court --

14 THE COURT: That's an ominous-looking stack of
15 papers.

16 MR. VEEDER: It is a tremendous stack of papers,
17 Your Honor. It is a Motion for Judgement and
18 Memorandum in Support.

19 THE COURT: Have these been served on Counsel?

20 MR. VEEDER: They are being served now, Your
21 Honor.

22 THE COURT: Well, what are we going to do about
23 the testimony here?

24 MR. VEEDER: Well, I would like to -- I think it
25 is within the Rules of Civil Procedure to move for a

1 judgment on the basis of the record as it presently
2 stands reserving the right to proceed and put in evi-
3 dence.

4 THE COURT: All right. You can make your motion.
5 Do you anticipate we will interrupt now while we go
6 through all this material?

7 MR. VEEDER: No, I don't expect you to, Your
8 Honor, but I do think that I want the record to show
9 the basis upon which the Tribe is proceeding in this
10 case, and on the basis of which we think that the
11 trial -- the Defendant Waltons have failed totally
12 to make out a case on the basis of Your Honor's
13 specific directions that the case of the United States
14 v. Big Bend Transit Company would be the predicate for
15 your making determinations as to the issue of due
16 diligence, which is controlling here.

17 There is no evidence in the record whatever
18 of the diversion -- in the motion we set this out,
19 Your Honor -- that there are three tracts of land,
20 2371, which is one allotment. Mr. Hampson testified
21 that there was no irrigation, that is, no man-made
22 diversions of water to irrigate Allotment 2371. He
23 said that there was no irrigation on 894, and each
24 one of those tracts of land, Your Honor, are separate
25 parcels of land, are separate farmsteads that were

1 acquired by the Whams at various times. 2371 was
2 acquired by the Defendant Whams in the year 1921.

3 Now, there was no irrigation on that land
4 at the time that they purchased this property. There
5 is no evidence whatever that they diverted and applied
6 any water to a beneficial use in that area, so in
7 regard to 2371, it is abundantly manifest that the
8 rules of due diligence concerning which Your Honor
9 stated would be controlling here would have no applica-
10 tion.

11 The Defendant Waltons succeeded to a tract
12 of land that had never been irrigated, and Mr. Hampson,
13 the witness for the Defendant Waltons, testified that
14 that land had not been irrigated until 1948, to his
15 personal knowledge.

16 Now, we move to the issue of intent, which
17 is the most important single facet in regard to due
18 diligence.

19 Now, the record is abundantly clear that
20 the Whams were decent, Christian people, and the
21 Whams for a period of 20 years, based upon the record
22 that is presented here, had no intention to appropriate
23 water as against the Timentwa family, and I think that
24 is very, very crucial.

25 Mary Ann Timentwa Sampson occupied 901 and

1 903 for the period that coincides almost directly for
2 the period that the Whams were on the land. She
3 testified, if you look at Page 2 of the Memorandum
4 you will see the place so that we can identify where
5 these properties are situated --

6 THE COURT: Are you talking about your Memorandum?

7 MR. VEEDER: Yes, the one I just filed with Your
8 Honor and served on the parties.

9 MR. MACK: Your Honor, the State has not been
10 served with a copy of that.

11 MR. VEEDER: The State is not a party here.

12 THE COURT: All right, gentlemen. If the State
13 wants a copy, we will give it to them.

14 MR. VEEDER: Well, I will give him a handout on
15 it, but he is not entitled to it.

16 What we are saying here, Your Honor, is that
17 the intention of the Whams was not to appropriate
18 water as against the Timentwa family. We have exten-
19 sive statements in the record from Mary Ann Timentwa,
20 both from the standpoint of direct examination and
21 the examination by Mr. Price where they reviewed the
22 facts of the case, where the Timentwas came and --
23 I mean the Whams came and helped the Timentwas to
24 irrigate their land and to develop their land and to
25 utilize the land that had been irrigated long prior to

1 the time that the Whams began utilizing the small
2 amount of water that they utilized.

3 So, the very essence of due diligence is
4 not present here because the Whams, as I said, were
5 decent, civilized people, and they had no desire to
6 take water away from 901 and 903 that was occupied by
7 the Timentwa family. Indeed, the very reverse of
8 due diligence is fully sustained by the record, and
9 I think the evidence that has been put in fully
10 sustains the proposition that the Whams during a 20-
11 year period intentionally refrained from developing
12 lands in the amounts that would take water away from
13 the Timentwa properties which were irrigated all that
14 time.

15 It is extremely important, I think, at this
16 juncture in the proceedings for Your Honor to take
17 into consideration the principles of the Big Bend
18 case that says before there could be due diligence,
19 there must be an intent to appropriate, and here we
20 have the situation where there was an intent not to
21 appropriate in a manner that would damage 901 and 903,
22 the very reverse, Your Honor, of what the defendants
23 had to prove to succeed in regard to due diligence as
24 specified in the Decision of the 9th Circuit, Colville
25 vs. Walton in 647 Federal 2nd, 42, and particularly at

1 Page 52, where it says there must be a demonstration
2 of the amount of water that had been utilized.

3 There is not a word in the record, not a
4 word as to how much water was diverted and utilized
5 by the Whams. There is no evidence that they intended
6 to deprive the family that they were very close to.

7 It is extremely interesting to have the
8 testimony before Your Honor where the Timentwas
9 testified into the record that they were close friends
10 of the Whams. If work had to be done in the field,
11 they went out and helped the Whams, and the Whams
12 helped them. So, we do not have a situation that
13 prevails with the Waltons.

14 The Waltons monopolized and took all of the
15 water. The Whams showed the full intent not to take
16 the water. They show the full intent to allow that
17 water to go down so that the Timentwas would get three
18 cuttings of alfalfa, and that is undisputed in the
19 record.

20 Mr. Hampson testified that there was some
21 30 to 40 acres of land irrigated down below the Wham
22 property, and that is a figure that is not in any
23 sense contested today. So, for a period of 20 years,
24 the owners of those three tracts of land allowed the
25 water to run down and did not appropriate enough so

1 that at any time it would damage the Timentwas.

2 The evidence is undisputed that Mary Ann
3 Timentwa, who did the irrigating for those 20 years,
4 testified that those lands always received all of the
5 water that they needed, and that the Whams saw to it
6 that they didn't interfere with the delivery of that
7 water.

8 Now, Your Honor, I have submitted to you a
9 basic concept that we have from the standpoint of the
10 law. I have gone through and cited for Your Honor,
11 I think, all of the early cases in the State of
12 Washington. I have reviewed with care for Your Honor
13 that in every instance, every instance the controlling
14 element to bring into play to aspects of due diligence
15 pertain to an intention to take the water away from
16 these people.

17 Now, Your Honor, I will not belabor this
18 further. I will not argue it any further. I am
19 willing to go ahead and call my first witness to move
20 this case along, but I hope Your Honor, as this matter
21 progresses, will bear in mind that the concepts and the
22 rationale of the Tribe's case is that for 20 years
23 it was the intention not to take water, rather than
24 an intention to take water.

25 THE COURT: Are there relatively new authorities

1 and premises set forth in this Memorandum you have
2 just filed?

3 MR. VEEDER: Well, they are what I have just
4 filed here, Your Honor, is a review of the pertinent
5 cases as they relate to this matter. When we talk
6 about new cases, I don't believe that there are any
7 new cases.

8 THE COURT: Well, obviously, it will take me
9 some time to review a Memorandum of that length.

10 MR. VEEDER: Well, I didn't expect Your Honor
11 to rule on the motion. I wanted the motion in the
12 record. I would like to proceed with our case in
13 chief.

14 THE COURT: So there is a continuity in the
15 record, did Counsel want to respond at this time?

16 MR. SWEENEY: Well, the government would like to
17 review the motion and supporting Memoranda. We would
18 comment later on that.

19 THE COURT: There is extensive discussion in your
20 presentation, Mr. Veeder, of testimony that is in the
21 record that I don't know if anybody has called that to
22 my attention.

23 MR. VEEDER: The page and citations of the Timentwa
24 testimony are all here and you will find the Hampson
25 testimony documented, and it will not be greatly

1 different from what you have seen.

2 THE COURT: Let me ask you this: How much of
3 that information or those arguments were presented to
4 the 9th Circuit?

5 MR. VEEDER: This issue of due diligence was not
6 before the 9th Circuit at all, Your Honor. This matter
7 was -- there is nothing in regard to due diligence.
8 This is all within the purview of the Remand to which
9 I am making reference.

10 THE COURT: No, but the testimony that you
11 referred to, and I haven't reviewed it, of course,
12 but I didn't know about it. Was that as a basis for
13 the argument in the Circuit that Waltons were entitled
14 to no water whatsoever?

15 MR. VEEDER: No, no. The basis -- bear in mind,
16 I filed a brief two or three years ago.

17 THE COURT: Yes.

18 MR. VEEDER: I don't recall just exactly what we
19 said on that point, but I think you touched upon the
20 most crucial aspect of all in regard to the law in
21 this matter, and it is an issue that we want to
22 preserve.

23 THE COURT: Well, of course, the problem I have
24 is that the Circuit says that the District Court's
25 holding that Walton has no right to share in the water

1 reserved when the reservation was created.

2 All we determine is the amount of water he
3 appropriated. Your argument is that he didn't
4 appropriate any with due diligence, and that was not
5 resolved in the prior trial.

6 MR. VEEDER: That's absolutely right, because the
7 language of the 9th Circuit is very clear on that
8 because it says there are two ways they acquire a
9 right, and this Court has found there was no water
10 utilized by the Indians before the Whams bought the
11 property so that is out. There is no way they can
12 claim water on that basis.

13 THE COURT: Yes, I understand your position, but
14 obviously, I am going to have to go ahead and hear
15 the facts in this case. You understand that.

16 Did you want to make a statement at this
17 point?

18 MR. PRICE: Thank you. I will keep it brief.
19 Looking for the first time on Page 6, I find, one,
20 I think it is interesting that Counsel was able to
21 restrain himself from asking Mrs. Johnson, who is 88
22 and under great effort to be here, refrained and would
23 not ask her what their intention was in terms of were
24 they not intending to take any water from allotments
25 down below. Nothing could be further from the truth.

1 Her testimony was that the time of year that they
2 bought the property they started putting water to use.

3 It is also interesting to note, and the
4 record supports as quoted on Page 6 of Mr. Veeder's
5 Memorandum, (reading) "In addition to the Whams
6 leasing your mother's property, they were farming
7 some of their own property, were they not?"

8 Answer: "Yes, they were."

9 This so-called intent to preserve the
10 Timentwas was at a time when the Whams were leasing
11 and farming that land. The Coppells had leased it
12 before that as was testified here to today, and any
13 intention referring that the Whams didn't intend to
14 use the water appropriated to their own use is just
15 incredulous.

16 I find that Mr. Veeder's objections through-
17 out our testimony about trying to infer intent seems
18 not to challenge or concern his conscience about
19 him now getting up and telling this Court what Mrs.
20 Johnson's intention was after she was here to testify
21 and answer that question directly, which I think she
22 did by indicating the purposes to which the Whams put
23 the water.

24 THE COURT: All right. Well, as I indicated
25 earlier in this proceeding, my intention is to complete

1 the record, take the testimony from the various
2 interested parties, and hopefully, reach at some
3 juncture a reasoned conclusion which, right or wrong,
4 will bring this matter to a conclusion in this Court,
5 at least.

6 So, we should go ahead with the testimony,
7 Mr. Veeder.

8 MR. VEEDER: I call Mr. Kaczmarek. If we could
9 have about three or four minutes, Your Honor, to get
10 the exhibits put up?

11 THE COURT: Why don't we take a few minutes
12 then, and I will just wait until you are ready.

13 All right, Mr. Veeder, you can proceed.

14 MR. SWEENEY: Your Honor, if I can present a
15 Memorandum on behalf of the government, as long as
16 these are being submitted.

17 THE COURT: Did you serve the State?

18 MR. SWEENEY: We served the State, Your Honor.
19 Yes, we did, and also all the other parties.

20 MR. VEEDER: Did you serve the Tribe?

21 MR. SWEENEY: Yes, we did.

22 THE COURT: What is the thrust of your Memorandum,
23 Mr. Sweeney?

24 MR. SWEENEY: Well, it is similar -- well, first
25 of all, in order for there to be a water right trans-

1 ferred with the lands which go out of trust, there
2 must be evidenced an intention that a water right be
3 transferred at the time that it leaves trust, and
4 also that the due diligence must be displayed, under
5 the 9th Circuit Decision, is that to be displayed in
6 a short period after the lands leave trust and cannot
7 be delayed until a later time.

8 THE COURT: All right.

9 MR. PRICE: Your Honor?

10 THE COURT: Do you have something to file, Mr.
11 Price?

12 MR. PRICE: Yes, and I delivered a copy to the
13 Court this morning, and I thought I had delivered a
14 copy to each of the counsel this morning with my
15 brief. Mr. Sweeney indicates he didn't receive a
16 copy of it.

17 MR. VEEDER: I received one.

18 MR. PRICE: We are in agreement for once. That's
19 amazing.

20 MR. VEEDER: I can start over again.

21 MR. SWEENEY: I will make a copy.

22 THE COURT: Let's not start anything over again.
23 All right. Go ahead, Mr. Veeder.
24
25

1 MICHAEL B. KACZMAREK, called as a witness on behalf
2 of the plaintiff herein,
3 having been first duly sworn,
4 was examined and testified as
5 follows:
6

7 THE CLERK: Would you please state your full name
8 to the Court and spell your last?

9 THE WITNESS: My name is Michael B. Kaczmarek,
10 K-A-C-Z-M-A-R-E-K.
11

12 DIRECT EXAMINATION

13 BY MR. VEEDER:

14 Q. Mr. Kaczmarek, would you state into the record your
15 educational background?

16 A. Well, I have a Bachelor's degree and a Master's
17 degree in geology. My educational background is in
18 geology and soil science from Montana State University,
19 at Bozeman, Montana.

20 Q. Now, what has been your experience after you got out
21 of college, Mr. Kaczmarek?

22 A. Well, upon completion of my Bachelor's degree, I
23 spent four years with the Army Corps of Engineers as
24 an officer in charge of construction projects of
25 various types, both in the United States and overseas.

1 When I completed that duty, I returned to school, got
2 my Master's degree, and since that time, I have been
3 employed as a chief geologist and soil scientist for
4 Morrison-Maierle, Incorporated, which is a consulting
5 engineering firm.

6 Q. Would you state into the record your acquaintance with
7 No Name Creek Basin and the period of that acquaint-
8 tance? How you became acquainted with the area, and
9 if you go ahead with that, I will ask some more
10 questions.

11 A. Certainly. Well, briefly --

12 MR. PRICE: Excuse me. I realize you have to
13 have some background to bring you up to speed as to
14 this witness's qualifications, but I am going to
15 object to going too far as we have gone at length
16 into this in the first trial, and other than getting
17 his formal education and background, the fact that
18 he is acquainted with the case, I think we can all
19 stipulate to that.

20 THE COURT: Well, as I have said this morning, I
21 would expect you not to put in too much testimony
22 that's already in the record, but I think to have it
23 in context, I will leave that largely to the dis-
24 cretion of Counsel.

25 Q. (By Mr. Veeder) Would you proceed to explain into the

1 record briefly, but completely, your acquaintance
2 with the No Name Creek Basin, the hydrology, the
3 geology, and the soils with particular reference to
4 your investigations on the lands of the Defendant
5 Waltons, please?

6 A. Briefly, I was -- my firm and I were hired by the
7 Colville Confederated Tribe in '76, to conduct
8 investigations into the availability and distribution
9 of ground water in the No Name Creek Valley, and to
10 quantify the availability of that creek source, and
11 in conjunction with that work, we conducted a number
12 of detailed investigations, one of which was a
13 detailed investigation of the agricultural soils of
14 the No Name Creek Valley and their suitability for
15 irrigability or for irrigation management.

16 We conducted detailed drilling programs to
17 investigate the subsurface geology of the basin and
18 identify where the ground water aquifers were
19 located, and we conducted numerous measurements of the
20 ground water levels and flow of ground water through
21 the No Name Creek Valley, as well as numerous measure-
22 ments and observations of the surface water flow in
23 No Name Creek, and, well, I think that briefly gives
24 you an idea of my background.

25 We have been involved in it since 1976, and,

1 of course, we testified extensively about this in the
2 previous hearings.

3 Q. Now, would you step to the exhibit, Colville Exhibit
4 No. 6, and briefly state into the record for the
5 Court the objective in the preparation of the map?
6 Give -- read into the record the titled box and
7 then proceed from south to north and explain the
8 geology succinctly and rapidly as it appears on
9 Colville Exhibit 6, please.

10 THE COURT: Is this an exhibit, Mr. Veeder,
11 in evidence?

12 MR. VEEDER: This is in the record, Your Honor.

13 THE WITNESS: Colville Exhibit No. 6 is entitled
14 General Geology, and this exhibit was prepared by
15 myself in December of 1977, and the exhibit depicts
16 the surface geology features of No Name Creek Valley
17 as based on surface geologic mapping conducted on the
18 ground supplemented by various test drilling programs
19 that went on during the course of the initial investi-
20 gation.

21 Briefly, what it shows, and there is a
22 legend at the bottom of Colville Exhibit 6, it defines
23 the different types of geologic materials that are
24 exposed at the surface in the No Name Creek Valley,
25 and very briefly what you see here is -- by the way.

1 This is on an aerial photo basis with the sections
2 and township and range descriptions set out on it to
3 give us an idea of where we are located, as well as
4 the allotment boundaries and the allotment numbers
5 associated with each tract of land.

6 The blue area that you see running along
7 both sides of the No Name Creek Valley consists of
8 granitic bedrock. The valley then is simply a trough
9 that has been excavated into the granitic bedrock.
10 I won't go much into the history of that except to
11 say that subsequent to the formation of the trough
12 in the granitic bedrock, the depression was partially
13 revealed by a number of different types of uncon-
14 solidated surfacial materials primary of glacial
15 origin.

16 THE COURT: You mentioned the blue. Is that the
17 lighter blue or darker blue? There are two colors
18 of blue on it.

19 THE WITNESS: Right. Now, the darker blue that
20 you see over most of the map here is the aerial
21 photo depiction of the terrain in the area, and it is
22 a blue line print made on an Oslo Machine. The
23 lighter blue that's hand colored on here shows the
24 distribution of the granitic bedrock at the surface
25 of the land in the area including the No Name Creek

1 Valley and right alongside of it.

2 The other features I would like to draw your
3 attention to briefly here that are of significance to
4 what we are discussing here today is the green area
5 including the central part of Allotments 526, 892,
6 and the very northernmost portion of Allotment 525.

7 The green area that I am describing here
8 is labeled Q-OWL, which stands for an old outwash
9 terrace and this area consists of unconsolidated
10 sand and gravel. It is quite porous material, and
11 it is the material which contains the No Name Creek
12 aquifer, and which yields relatively large amounts
13 of water for ground water wells.

14 THE COURT: Let me interject a question to Mr.
15 Veeder. The value of this evidence is going to what
16 issue that is before us today?

17 MR. VEEDER: It goes directly to the issue that
18 water -- may I ask the question and this will bring it
19 out?

20 THE COURT: Sure.

21 Q. (By Mr. Veeder) Would you state into the record
22 what is designated -- explain what the area marked in
23 red means and how it relates to the Colville's
24 Allotments 525, 2371, and 894, please.

25 A. The area marked in red on Colville Exhibit No. 6,

1 extends on down through the southern three-quarters
2 of Allotment 525 on into the central portion of
3 Allotment 2371, and into and throughout the length of
4 Allotment 894.

5 The red material consists of fine grained
6 alluviums, old alluvial fill, and the area colored
7 in red is restricted to the valley floor, and that
8 valley floor area colored in red is most of the extent
9 of the valley bottom on the Walton's property.

10 The red material, as I said, is very fine
11 grained material. It is very slowly permeable, and
12 it provides a barrier to the movement of ground water
13 from the north part of the valley towards the south
14 part of the valley. I wanted to go over this very
15 briefly just to acquaint you with some of the geologic
16 facts of the valley because this is germane to the
17 exhibits that we will show in a few moments regarding
18 the Walton's property and the ground water condition
19 on that property.

20 Q In that regard, Mr. Kaczmarek, to move things along,
21 we have on the map here -- this has been marked for
22 identification Colville's Exhibit No. 44.

23 Now, would you state into the record --
24 would you read the title box into the record first,
25 Mr. Kaczmarek?

1 A. The Colville Exhibit No. 44 is titled General Distri-
2 bution of Aquifer and Nonaquifer Materials.

3 Q. Now, would you state into the record who prepared that
4 exhibit?

5 A. I prepared this exhibit.

6 Q. And it was all completed by your own investigations;
7 is that correct?

8 A. That's correct.

9 Q. Everyone has admitted that you are an expert in this
10 field.

11 MR. VEEDER: I offer this Exhibit 44 in evidence.

12 MR. PRICE: This is a new exhibit.

13 THE COURT: The second one, apparently, is a new
14 one.

15 MR. VEEDER: I gave it another number. I numbered
16 it 44. It's a new exhibit designed primarily to
17 show the movement of waters in the areas under the
18 Tribe's Exhibit 8526 and 892, as distinguished from
19 the Walton's exhibits -- I mean, Allotments 525, 2371,
20 and 894.

21 MR. PRICE: Your Honor, I am going to object for
22 the purpose that I know once we open this up we are
23 off and running as we have been before. I don't think
24 the Court remanded this to go back for redoing maps
25 of geological studies so that the Tribe might change or

1 alter the significance of what was testified to
2 earlier unless there can be some showing that it
3 relates to the question of diligence.

4 THE COURT: That was the question that I pro-
5 pounded to Mr. Veeder. Does this relate in some manner
6 to the question of due diligence on behalf of the
7 Waltons?

8 MR. VEEDER: Yes, indeed.

9 THE COURT: All right. If you would enlighten
10 me on that, I would appreciate it.

11 MR. VEEDER: The most crucial aspect in regard to
12 the claims of the Defendant Waltons relates to the
13 quantity of water that they could beneficially use
14 on their lands.

15 The issue as to how much water they can
16 beneficially use on the land is directly and inextric-
17 ably interrelated to the fact that the lands are water-
18 logged to the point of what we will describe as the
19 granitic lip. The water is backed up to the point
20 so that the area is totally saturated. It is totally
21 saturated. The ground water table is necessarily
22 high throughout this red area, and it is the level
23 of the ground water in the lands owned by the
24 Defendant Waltons that permits the water to run across
25 the granitic lip and down to Colville Allotments 901

1 and 903.

2 But, going directly to the opinion of the
3 9th Circuit, it is the issue of the amount of water
4 that the Waltons can possibly claim assuming they
5 had proved some due diligence, which I deny. I think
6 that the Whams didn't appropriate water against the --

7 THE COURT: I understand your position there.

8 MR. VEEDER: Now, here's where we are. We are
9 going to demonstrate that on 75 percent of the land,
10 at least, it would be a waste of water to apply
11 irrigation water. On the balance of the land, we
12 will show -- I'm talking about the Walton land --
13 on the balance of the land, probably two inches of
14 water is all that he could handle. It is nothing more
15 or less than a swamp and a bog from about the place
16 where the homestead is situated and southward.

17 THE COURT: You are saying it doesn't need to be
18 irrigated?

19 MR. VEEDER: What?

20 THE COURT: You are saying it doesn't really need
21 to be irrigated?

22 MR. VEEDER: It doesn't need to be irrigated,
23 and it is a waste of water to put it on.

24 THE COURT: Why are we irrigating it?

25 MR. VEEDER: Well, I don't know. I think that

1 where we are situated in regard to this, we offered
2 on cross-examination -- we showed photographs of the
3 Defendant Waltons irrigating standing water on the
4 surface of the ground. Now, that surface water is
5 situated along in here, Your Honor, and that area has
6 been waterlogged and soaked from time immemorial and
7 before.

8 Now, these are important elements in regard
9 to the amount of water, assuming there was due dili-
10 gence, as to the amount of water that they could
11 legally claim under any concept. We will demonstrate
12 that.

13 THE COURT: All right. I am going to permit it.
14 I assume you are not going to be any great deal of
15 time on this, are you?

16 MR. VEEDER: No, no. We are moving along, Your
17 Honor.

18 MR. PRICE: Well, Your Honor, I take exception to
19 that. It is always, "No, we are going to speed right
20 along," and we are going to go back into the geology
21 from year 1 and go forward, and there is no statement
22 yet as to what the new exhibit does that the old exhibit
23 doesn't do.

24 THE COURT: Well, what I am saying, Mr. Price, is
25 in the interest of moving this matter along, as I did

1 this morning, I am going to permit the testimony.

2 Now, that doesn't necessarily mean I am going to place
3 any great weight on it or I will hear you on argument
4 as to what your issues are, but --

5 MR. PRICE: Might I ask that Mr. Veeder restrain
6 from closing arguments and legal arguments in terms
7 of that might speed things along in terms of his
8 analysis of what this will prove?

9 MR. VEEDER: I would, if Mr. Price would quit
10 interfering with our case.

11 THE COURT: If we could just get along with our
12 testimony and do away with colloquy, we could get along
13 a lot better.

14 MR. VEEDER: I agree, Your Honor.

15 Q. (By Mr. Veeder) What I would like you to do, Mr.
16 Kaczmarek, is explain the difference between the lands
17 in 892, and the lands in 525, 2371, and 894, as they
18 relate to the issue of the consequences of applying
19 water to those lands, and what is evidenced by what
20 you call the aquicludes. What is an aquiclude; what
21 does it mean, and why is the application of water to
22 it have little or no use or benefit to any crops that
23 might be on it. Would you proceed from that?

24 MR. PRICE: Your Honor, I am going to ask that we
25 not get in narrative style testimony.

1 THE COURT: That's probably a quadruple
2 compound question.

3 Q (By Mr. Veeder) I will ask you to just state into
4 the record what do you mean by aquiclude.

5 A That pertains to geologic materials that store ground
6 water, but have very little capacity to, in other
7 words, it is saturating the material, but if you
8 drill a well into it, it's so slowly permeable that
9 your well does not receive water at any great rate.

10 Q Would you state into the record whether there are
11 productive wells on any of that?

12 A There are not any productive wells in the aquiclude
13 or in any portions of the No Name Creek Valley, and
14 I might state very briefly both of the --

15 Q Would you refer to Exhibit 44, please?

16 A Exhibit 44, Colville Exhibit 44, has shown on it all
17 of the production wells and different observation
18 wells that were constructed during the course of the
19 irrigation development and the subsequent investiga-
20 tion of ground water system and those are shown by
21 the colored -- the red colored circles in numbers.
22 Somewhere in here in the evidence we have a key that
23 explains the name of each one of these wells, and
24 there is the evidence presented about the construction
25 and depth and water levels in the wells.

1 The Colville Exhibit No. 44 is simply a
2 duplicate of Colville Exhibit No. 6 with the exception
3 that we have shown only those surfacial materials on
4 the valley floor, and it just makes it a little
5 easier to read the thing. It takes off a lot of the
6 extraneous detail.

7 MR. VEEDER: We offer Exhibit 44, Your Honor.

8 MR. PRICE: Objection as has been stated before,
9 Your Honor.

10 THE COURT: Yes, I know there is an objection, but
11 I am going to, in accordance with the practice I
12 started this morning, I am going to admit it, and then
13 I will give it such weight as it deserves, so it will
14 be admitted.

15 Q. (By Mr. Veeder) Now, Mr. Kaczmarek, would you state
16 generally the important geological features as
17 disclosed by Tribe's Exhibit 44, starting in the south
18 with the area which we referred to as the granitic
19 lip and explain into the record what that means from
20 the standpoint of a high water table in the area
21 throughout the Walton property?

22 A. The area referred to as the granitic lip on Colville
23 Exhibit No. 44, is located at the southern boundary
24 of the Walton property on Allotment H-894. The
25 granitic lip is colored blue on Colville Exhibit No.

1 44, and it consists of a rock or a granite wall that
2 extends across the width of the valley at that loca-
3 tion, and it presents a barrier to the movement of
4 ground water from the north part of the basin to the
5 south basin.

6 Any ground water or surface water that
7 moves from north to south has to pass over that lip,
8 so it is a threshold that controls the discharge
9 of water from the No Name Creek Valley, and this being
10 that the area located up gradient to the north of the
11 granitic lip has water ponded, if you will, in it in
12 the ground water system behind that granitic lip,
13 and the water in the ground water system north of
14 the granitic lip has to rise to an elevation at or
15 above the granitic lip before it can spill out of the
16 granite basin and spill out.

17 Q. What is the effect of that high water table in regard
18 to the irrigability of the land and the productivity
19 of it?

20 A. Well, the result of the granite lip and its control
21 and influence on the ground water levels.

22 MR. PRICE: Excuse me. There has been no founda-
23 tion as to this man's knowledge about the productivity
24 of particular crops or any foundation for his back-
25 ground in that area.

1 Q. (By Mr. Veeder) Mr. Kaczmarek, would you state into
2 the record your background from the standpoint of
3 agriculture?
4 A. Well, as a soils scientist, a major portion of my work
5 is investigation of agricultural lands as to the
6 suitability of the land for irrigation, productivity
7 of the land under various types of management prac-
8 tices, and in general, the suitability of the land
9 for agriculture.
10 Q. Were you raised on a farm?
11 A. Yes, I was.
12 Q. And did you have anything to do with determining what
13 would produce crops and what would not produce crops?
14 A. Well, certainly. Any farmer can recognize what land
15 is productive and what is not.
16 Q. And have you had any experience in determining whether
17 the kind of or the type of soils that are involved
18 where you want to get a well drilled and produce
19 water by means of a well?
20 A. Yes, I have.
21 Q. Have you investigated, for example, this land to which
22 we are referring here in regard to the kind and type
23 of vegetation that grows on this land?
24 A. Yes, I have.
25 Q. And would you state into the record whether the vege-

1 tation that grows in that land comports with the
2 phreatophytic growth that normally appears on high
3 water table land?

4 A. Yes. The vegetation that appears in the areas we
5 have colored in red consists of wheat grass and other
6 -- some sedges along the creek, some areas phreato-
7 phytic growth, some water discharging from the soil
8 just above it discharges over the granite lip, and
9 in general, it is an area with a sustained high or
10 shallow water table. The water is somewhat saline
11 due to that fact, and so all the vegetation is that
12 that you find characteristic of a wet soil area.

13 Q. What does it mean from the standpoint of producing
14 small grains or something like that?

15 A. Well, you couldn't produce small grain on it. They
16 are not tolerant of the saline soil condition.

17 Q. And what about alfalfa; do you find alfalfa produced
18 in that area down there?

19 A. No, you don't.

20 THE COURT: What is growing on the land?

21 THE WITNESS: Wheat grass and some short grasses
22 and that sort of thing.

23 THE COURT: Is that a useful crop?

24 THE WITNESS: Yes. There is some forage value
25 to the shorter grasses that grow in the area. The

1 wheat grass has very limited forage value. It's the
2 dominant species in the area.

3 Q. (By Mr. Veeder) Would you cut the wheat grass for
4 -- when it is matured? Can you cut it for hay?

5 A. Well, you can.

6 Q. Well, is it suitable for hay?

7 A. It doesn't have very high nutritional value.

8 Q. Go ahead and answer the question.

9 A. Well, I was going to say that it doesn't have very
10 high nutritional value, and cattle that are grazing
11 in the area right now do not graze it because there
12 are other grasses available there, so they might
13 graze it for four or five days in the spring when it
14 first turns green, but after that, they avoid it.

15 Q. Throughout the irrigation season, throughout the
16 grazing season, do you find any rye grass or whatever
17 it is growing there? Is that palatable to livestock?

18 A. Well, what I have personally observed in that area
19 down there is that cattle graze around the wheat grass
20 and it is standing in clumps up to waist high and
21 everything around it has been grazed down, but the
22 cattle don't seem to use it for forage as long as
23 there is something else there.

24 Q. Have you ever seen any meat that's --

25 A. No, I haven't.

1 MR. VEEDER: I ask we be permitted to go ahead
2 on the basis that this man is qualified to testify
3 particularly in regard to the brush and weeds that
4 grow on the Walton property.

5 THE COURT: Yes. Go ahead.

6 Mr. Price, do you have a comment?

7 MR. PRICE: It is probably not appropriate,
8 Your Honor.

9 THE COURT: I think I will hear the testimony.
10 I would much rather err on the side of having
11 evidence in the record that may have some questionable
12 relevancy than to exclude it.

13 MR. PRICE: I just do want to know --

14 THE COURT: We have got to put this case to bed.

15 MR. VEEDER: Yes, sir. I am trying to get it to
16 bed.

17 MR. PRICE: I think we could -- that any farmer
18 recognizes what land is productive and what is not.
19 I think if we could just leave it there, I think we
20 could probably get finished.

21 THE COURT: I told you we would go until 5:30.
22 I have a commitment to keep tonight.

23 MR. VEEDER: Do you want to adjourn now? We
24 are going to go onto another exhibit.

25 THE COURT: I think we ought to adjourn now.

1 What time in the morning, gentlemen? How about 9:00?
2 MR. VEEDER: 9:00 is fine.
3 THE COURT: Mr. Sweeney?
4 MR. SWEENEY: That's fine.
5 THE COURT: Mr. Price?
6 MR. PRICE: What was the time?
7 THE COURT: 9:00.
8 MR. PRICE: That would be fine.
9 THE COURT: I stated earlier that I don't want to
10 crowd you too much.
11 MR. PRICE: That's satisfactory.
12 THE COURT: All right. We will be in recess
13 until 9:00 in the morning.
14 (The evening recess taken at
15 this time.)
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